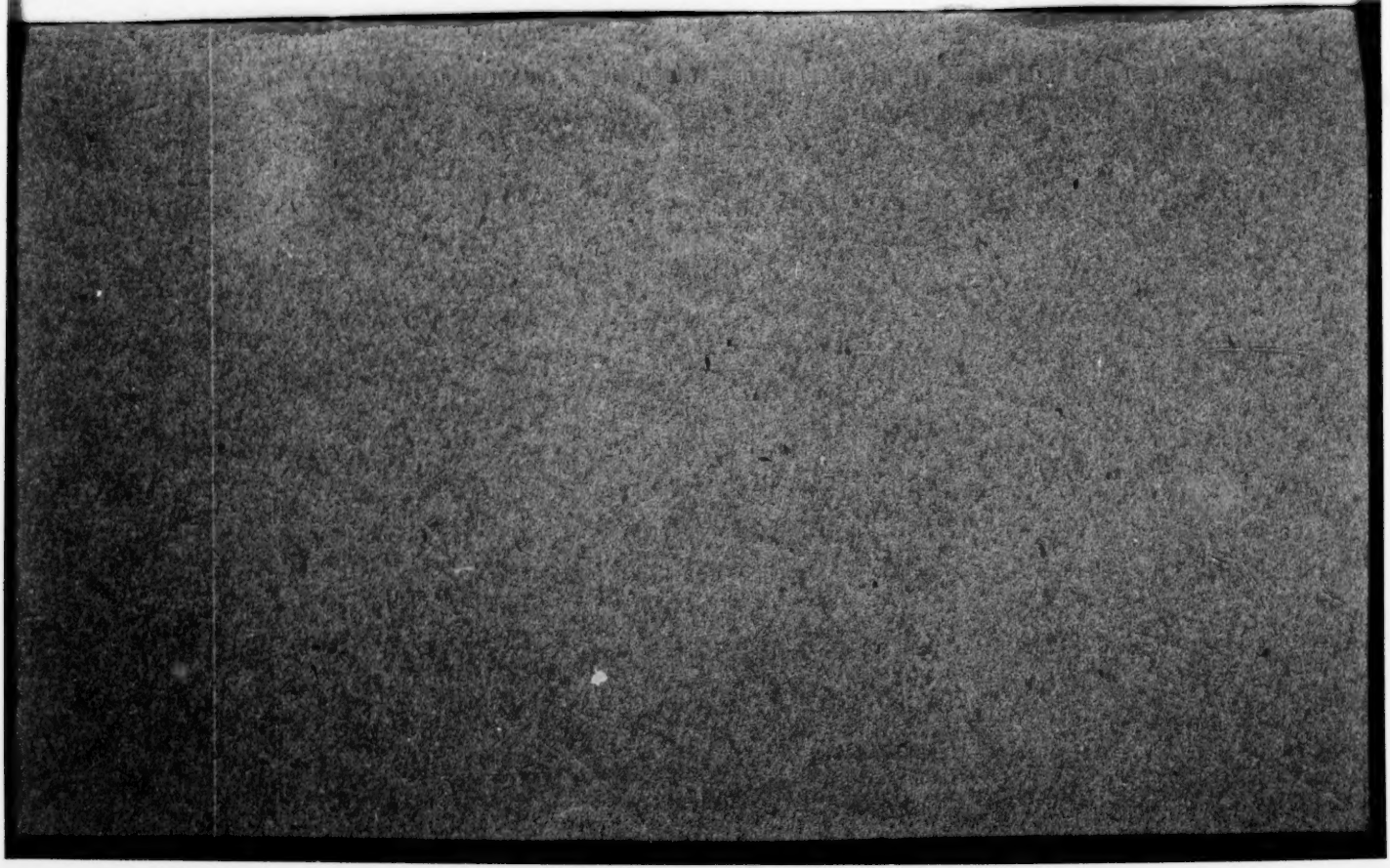

(19,704.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 604.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY AND THE AMERICAN BONDING COMPANY OF BALTIMORE, APPELLANTS,

vs.

KENNEDY J. HANLEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Circuit Court of the United States, District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE STATE-Idaho Mining and Developing Company (a Corporation), Defendants.

Bill of Complaint.

To the judges of the United States circuit court for the district of Idaho, northern division:

Comes now your orator, Kennedy J. Hanley, and hereby complaining alleges and shows:

That your orator is a citizen of the United States, and a resident and citizen of the State of Idaho, residing at Wardner, Shoshone county, of said State.

That the said defendants Charles Sweeny and F. Lewis Clark, are each citizens and residents of the State of Washington, and that the defendant, The Empire State-Idaho Mining and Developing Company, named a defendant herein, is a corporation organized and existing under the laws of the State of New York, and a citizen of said State of New York, and is engaged in carrying on business, as a corporation, at the town of Wardner, Yreka mining district, Shoshone county, in the northern division of said district of Idaho, by agents doing business in its name, and that the defendants Sweeny and Clark have been, and now are, officers of said corporation, and have been for a long time past.

That on the 30th day of April, 1898, your orator was, ever since has been, and now is, the owner of eleven twenty-fourths of certain mining ground lying in Yreka mining district in said Shoshone county called the "Skookum" mining claim, for which patent had been issued by the United States, and under which patent rests the true source of all title to the same in its present claimants.

Your orator further shows to the court that his right to a one-third interest of said "Skookum" is, briefly stated derived as follows:

That in the month of November, 1896, the estate of one David McElvey, deceased, was in the probate court of Shoshone county, Idaho, for settlement, and an administrator was in charge of the property of said estate which owned an undivided one-third interest in said "Skookum" mine.

That on the 30th day of November, 1896, after regular proceedings therein, the probate court aforesaid made and entered its judgment and decree to the effect that a necessity had been shown for the sale of said interest in said "Skookum" mine, as required by law, and directing that the administrator thereof should proceed

according to the provisions of the State — to offer said property to purchasers for bids thereon; said decree adjudicating a sale of said property was entered in the regular proceedings of said court on the 30th day of November, 1896, after a hearing thereon, as provided by law, a copy of which is hereto annexed, made a part hereof, and marked Exhibit "A."

That afterwards, and about the 1st day of June, 1897, your orator announced to said administrator that he bid for said interest, and would pay the sum of seven hundred and fifty dollars ($750.00) therefor if said bid should prove to be the highest and best bid therefor, and said bid was afterward reported to the probate court.

That afterwards the said administrator, on or about the 1st day of July, 1897, informed your orator that in response to his offer to receive bids for said interest in said "Skookum" mine he had received one offer of seven hundred dollars ($700.00) from the Chemung Mining Company, and that the same was the only other bid, aside from your orator's, made therefor, and that the matter of whether your orator's offer should be accepted would be heard at some day during the July term of said probate court.

That your orator being then an owner of an interest in said "Skookum" mine, was desirous of acquiring a further interest, and so informed said administrator, and further stated to him that he would pay more than seven hundred dollars ($700.00), the amount of said Chemung bid, and would abide his bid of seven hundred and fifty dollars ($750.00).

That afterwards your orator was informed by said administrator that the hearing as to which of said offers would be accepted would be heard in the probate court on the 26th day of July, 1897, and invited your orator to be present at said hearing.

Your orator further states that at the time when said bid was made in the name of the Chemung Mining Company your orator was a holder and owner of one hundred and twenty-five thousand (125,000) shares of its capital stock (one-fourth of the whole), while the defendants Sweeny and Clark held and owned the remainder, three hundred seventy-five thousand (375,000) shares, less a few shares standing in the name of one Goodspeed, who was an employee in the office of said Sweeny and Clark; and the said Sweeny, Clark and Goodspeed constituted the board of trustees of said mining company, and were in exclusive charge of its books and business, at Spokane, Washington, under the laws of which State said company had been organized.

Further alleging, your orator shows that said mining company was without funds in its treasury, and *had at* the date of its said bid, nor at any date prior, nor on the 13th day of August, 1897, any money with which to make its alleged bid good, or any bid whatever, nor had it ever or at any time authorized or directed said purchase of said "Skookum" interest to be made by any person whomsoever; and said pretended bid for purchase was a sham bid, made without authority and without the means to make it good, and was a fraudu-

lent device intended to prevent any sale at the time; contrived by the defendants Sweeny and Clark, for purposes of their own, which will more fully appear hereafter.

That well knowing that said bid was not the bid in fact of the said Chemung Mining Company, and being willing to increase his own holdings in said "Skookum" mine in pursuance of the invitation of said administrator to be present on the 26th day of July, 1897, for that purpose, your orator repaired to Murray, Idaho, and appeared in the probate court on said day, and there and then informed said administrator and said probate court that he was ready and willing to make his said bid good, and to pay for said one-third interest the sum of seven hundred and fifty dollars ($750.00) cash, the said — being fifty dollars ($50.00) more than the pretended bid of the said Chemung Company.

That the said administrator and the said probate court then and there informed your orator that they expected still other bids from other parties, and that for the purpose of giving time to those expected bidders to arrive, the judge of the probate court took a recess of his court from 12 m. to 4 p. m. of said day; that at 4 p. m., there being no further bids, and the said Chemung Mining Company putting in no appearance, either by its attorney, A. G. Kearns, or by any person, nor making good its offer by the deposit of the money thereon, and your orator's offer of seven hundred fifty dollars ($750.00) being the highest bid and accompanied by the cash, *and* said probate court then and there confirmed said sale to your orator, and directed the said administrator to accept the money, to wit, seven hundred fifty dollars ($750.00), and execute a conveyance to your orator, all of which was then and there done, and your orator paid the price, received his deed, and placed the same on record.

And the said proceedings are fully verified by the decree entered on said date in said probate court, a copy of which is hereunto annexed, and made a part hereof and marked Exhibit "B," save and except that in said decree it is recited that said "Kennedy J. Hanley having bid the sum of $700.00 for said undivided one-third interest," the same is accepted, whereas said recital is erroneous as to the amount bid and paid, which was seven hundred and fifty dollars ($750.00), as will be fully proved.

Further, your orator shows that about the 6th of October, 1897, he was informed by rumor that some proceeding had been had in said probate court, by which the title which had been conveyed to him in virtue of the proceeding theretofore had in said court on the said 26th day of July was brought into question, and that said administrator had been ordered and directed by said probate court to make another conveyance of said interest in said mine to the said Chemung Mining Company, and had refused to comply with said directions to make said second conveyance, upon the ground that he had, under the decree of July 26th, 1897, conveyed all the title held by said estate therein, and would convey nothing further; thereupon the Chemung Mining Company brought its action of

mandamus in the district court of the first judicial district in and for said county and State, to compel the said administrator to execute a conveyance to the said Chemung Mining Company ordered by the probate court, and then it was that your orator was advised of the proceedings which had been had in the probate court in the meantime, which proceedings were as follows: About the 13th of August, 1897, said Chemung Mining Company applied by its attorney, one A. G. Kearns, to the judge of probate court of said county, to set aside and annul the decree of the court of July 26, 1897, confirming the sale of said one-third interest to your orator, and to declare said sale and conveyance void.

That said probate court, without any notice of said application to your orator, and without taking any proof in any form, and after the subject matter had passed out of its jurisdiction, and without having any jurisdiction to set aside and cancel a conveyance of real estate, at any time, made and entered upon its record an order calling the same a "decree," to the effect that, "It appearing that on the 26th of July, 1897, an order was made by this court confirming the sale of said real estate (the undivided one-third of the "Skookum" Lode mining claim) in one Kennedy J. Hanley, and directing said administrator to execute proper and legal conveyance thereof to said Hanley," etc. "And it appearing to the satisfaction of the court that such order confirming the said sale in Kennedy J. Hanley was obtained by misrepresentation and fraud upon the part of the said Kennedy J. Hanley in pretending to represent the said Chemung Mining Company, and all and singular the premises being by the court here seen, heard and considered:

"Wherefore, it is ordered, adjudged and decreed, that the said order made herein, on the 26th day of July, 1897, confirming said sale in Kennedy J. Hanley, be, and the same is hereby vacated, set aside and annulled." And then the court further proceeded to confirm a sale of said property to the Chemung Mining Company, and directed the administrator to execute a conveyance thereof to said company; all of which proceedings of August 13, 1897, were had without notice to your orator, and without any knowledge thereof on his part, without any proof of the fraud alleged as the grounds thereof, and without and beyond the jurisdiction of the court to do the same, and was an attempt to deprive your orator of his property secretly, by an *ex parte* order after it had accepted and appropriated his money paid therefor, and without any deposit or payment by said Chemung Mining Company for said property.

That the proceeding in the district court to compel the administrator to execute a conveyance under the last order above cited was had upon an *ex parte* showing made by the Chemung Mining Company, and the court holding that it was the duty of the administrator to obey the orders of the probate court, required the said administrator to make said conveyance by a peremptory mandate to that effect, and upon appeal to the supreme court of Idaho this judgment of the district court was affirmed, and the claim and title of

the defendants in this action to the ownership of this one-third interest is based solely and wholly upon the proceedings.

Your orator further states that at no time, either in the probate court proceedings above recited, after the 26th day of July, 1897, or in the proceedings of the district court, *was* your orator's claims or rights ever investigated or presented, nor was he a party to any such proceedings, which were begun secretly in order to exclude him from any part therein, and prosecuted to that end, without lawful notice to him, or any attempt to make him a party in any way whatever.

And your orator alleges that the defendants, having procured these illegal and fraudulent proceedings to be taken, give out and proclaim that through them they have acquired title to the said interest, and that the pretended proceedings in the probate court, and the action taken by said Chemung Mining Company, constitute an adjudication of the same binding upon your orator, although he has never been a party thereto, nor have the real and true facts ever appeared in any of the proceedings.

And your orator alleges that the proceedings of said probate court, of date August 13, 1897, were without jurisdiction of either the subject matter or the parties in interest; that after the close of the July term of said court it had no power or authority by law to set aside at the succeeding term of August, 1897, the judgment and degree made at its former term, as was assumed to be done August 13, 1897, except by regular proceedings for that purpose, to which the parties thereto were entitled to notice, if it possessed any power whatever in that behalf, and all of the pretended proceedings of said date were and are absolutely null and void, and the degree of said date is null and the proceedings thereunder totally void.

Your orator further shows that as to his undivided one-eighth interest in said "Shookum" claim, which, with the one-third aforesaid, makes his eleven twenty-fourths, your orator's title was regularly derived through conveyances from the patentees of the Government of the United States.

Your orator further shows, as aforesaid, that on the said 30th day of April, 1898, your orator, after having deposited twenty-five thousand (25,000) shares, being one-fifth of his holdings in the stock of said Chemung Mining Company, in the treasury of said company, was still the personal owner of one hundred (100,000) shares of its capital stock, and that said company then owned, by conveyances made to it, certain mining ground situatad in Yreka mining district, county of Shoshone, State of Idaho, consisting of the following mining claims, viz.: The "Lily May," "Jersey Fraction," "Cariboo," "Good Luck" and "Butte," and your orator, who shortly before that date had been chosen a trustee of said corporation, and the defendants Sweeny and Clark, were officers and trustees of said company, and owned its capital stock.

That the said defendant Sweeny and Clark held the majority of the stock of said company, and at the time the contracts hereinafter

alleged were entered into, were negotiating for the control of a number of other mineral claims lying about and adjoining the said "Skookum" mining claim aforesaid, with the declared purpose of putting all said properties under one control, and for the organization of a single corporation to operate the same for sale or profit in working.

That said scheme embraced the acquisition of the title to the property held by the Chemung company, also the claim hereinbefore referred to as the "Shookum," and a number of other adjacent and adjoining claims, covering an area of hundreds of acres of mineral lands of supposed great value.

That the interests held as aforesaid by your orator were of great importance to the successful launching of this proposed scheme, because said "Skookum" was surrounded by the other claims which defendants Sweeny and Clark had acquired and were seeking to acquire for the purpose aforesaid, and they approached your orator with an offer to purchase all his stock in the Chemung Mining Company, and all his claims and interest on said "Skookum" ground.

And your orator shows that, owing to previous business transactions and relations with the said Sweeny and Clark, in which he had regarded them as having treated him with bad faith he was anxious to close out his interests and avoid all further business complications or dealings with them.

That pursuant to the negotiations referred to, on the 30th day of April, 1898 a contract was entered into by which your orator agreed to execute conveyances for the two interests he held and claimed in the said "Skookum" claim, to wit, one for the one-eighth, and another conveyance for the one-third interest, and place the same in escrow in the Exchange National Bank of Spokane, at the price of ten thousand dollars ($10,000.00) for the whole, it being distinctly understood and agreed that neither deed should be delivered without the payment of the fixed price of ten thousand dollars ($10,000.00), and that upon its payment by said Sweeny and Clark, within the time specified, the envelope containing the two deeds should be delivered to said Sweeny and Clark, by the custodian thereof, E. J. Dyer, the cashier of said bank, and if not paid the same was to be returned to your orator.

That at the same time your orator and defendants Sweeny and Clark placed in a second envelope a certificate representing the one hundred thousand (100,000) shares of stock of said Chemung Mining Company, being all the stock held personally by your orator in said mining company, and placed the same in escrow, at the agreed price of twenty thousand dollars ($20,000.00), of which said sum the said Sweeny and Clark paid before the deposit of said escrow two thousand dollars ($2,000.00), the remaining eighteen thousand dollars ($18,000.00) to be paid as shown by the endorsement contained on the outside of said envelope, August 1st, 1898.

That the price of said stock agreed upon by the parties was twenty cents ($.20) per share, or twenty thousand dollars ($20,000) for the

stock, and ten thousand dollars ($10,000.00) for the interest in the "Skookum" claim, which sums were severally indorsed on the outside of said envelopes, as the price to be paid by the defendants Sweeny and Clark, to entitle them to be taken up, save that upon the envelope containing the stock the indorsement required only eighteen thousand dollars ($18,000.00) to be paid, as said Sweeny and Clark before their deposit had paid two thousand dollars ($2,000.00), as before stated; and said two options were distinct, and either or both could be accepted or rejected.

That when the terms of said contracts were agreed to, the negotiations having been conducted between the said Clark, on behalf of himself and his associates and your orator, the papers to evidence the same were prepared by the clerk of said Sweeny and Clark, and the execution of the two deeds, one for the one-third interest and the other for the one-eighth interest in said "Skookum," instead of in a single instrument, was made at the instance of the said defendants, and at no suggestion of your orator, and the indorsements on the envelopes into which the papers were placed were written by the said clerk at the dictation of said Sweeny, no reference being made therein to the contents of said envelopes, as will be seen by inspection of the copies thereof, which are hereto annexed and made a part hereof, marked respectively Exhibit "C" and Exhibit "D."

And your orator shows that the envelopes containing (one) the two deeds to the said "Skookum" mining interests, the other, the certificate of stock, were then taken, unsealed, to the said bank in the hands of the defendant Sweeny, the acknowledgments of said deeds being there taken by a notary, and the contents sealed and delivered to the custody of E. J. Dyer, the cashier of said bank.

That afterwards, at the request of the defendants Sweeny and Clark, and on the 7th day of June, 1898, your orator extended the time for payment on the envelope containing the deeds to the "Skookum" mining interests until the 20th day of September, 1898, and on the 7th day of June, 1898, made a like extension of the time for payment to be made upon the stock of the said Chemung Mining Company, the said Sweeny and Clark paying him at the said date the sum of two thousand dollars ($2,000.00), which your orator accepted as credit on the proposed purchase of stock, though no indorsement was made thereof on the said envelope.

Your orator further shows that on the 21st day of September, 1898, he called at the bank and found the following condition of facts: That the defendant Charles Sweeny, acting for himself and the said Clark, had deposited the sum of sixteen thousand dollars ($16,000.00), the balance of the price of said stock, to your orator's credit in said bank, and had taken, as he might lawfully do, the envelope containing the same; that the envelope in which had been placed the two deeds of the "Skookum" mining interest at the time the papers were signed had been opened and the deed to the one-third interest only remained therein, and the ten thousand dollars ($10,000.00) to be paid in order to have the contents of the said envelope, to wit, the

said two deeds, delivered to him and said Clark, had not, nor any part thereof, been paid; that nothing remained in said envelope to show who had taken said deed to one-eighth, nor could said custodian inform your orator what had become of the missing deed, and said Dyer informed your orator that no money had been paid on it, and that said Sweeny had not deposited anything on said escrow, and had declined to take it up; that it now appears that said missing conveyance executed by your orator to said one-eighth interest has been placed on the records of said county of Shoshone, wherefore your orator charges and alleges:

That at some time between the 30th day of April, 1898, when said deed was placed in said envelope before being deposited with said Dyer as an escrow, and the 21st day of September, 1898, the same was extracted unlawfully and surreptitiously therefrom, and without the consent or knowledge of your orator, and without payment of the said sum of ten thousand dollars ($10,000.00), or any part thereof, and caused to be placed upon the records of said county of Shoshone the said deed fraudulently and in violation of said contract.

That during all the negotiations for the sale of your orator's interests in said "Skookum" claim, it was understood that the price fixed upon the same without any reference to the extent of his interests, and that your orator refused to negotiate or contract for the sale of the one-eighth interest only at any price, unless the whole should be included, and when the bargain resulting in the escrow of his said interest in the said "Skookum" claims was agreed to, it was with the explicit understanding and agreement that your orator's interests in the "Skookum" represented by the two conveyances executed by your orator to the defendants Sweeny and Clark were to go as one single sale, and that it was separate and distinct from the stock escrow, and the two deeds were to be placed in a separate envelope for that reason; that your orator during all the negotiation, and at the time the contract was finally agreed to, refused to make any contract for the sale of any interest he claimed in the said "Skookum" claim, unless and except it should be for the whole of what he claimed, and that it should be separate and distinct from the contract for the sale of the Chemung stock; that the taking of this deed for the one-eighth interest from the possession of the said custodian was a gross and willful fraud, perpetrated without the knowledge of your orator, and was in defiance of the contract of the said parties.

That through the said fraudulent means the said Sweeny and Clark have obtained an apparent title to the said one-eighth interest of said "Skookum" mine, in violation of their agreement to pay ten thousand dollars ($10,000) therefor, and without any consideration whatever, all of which is against right, justice and good conscience.

Your orator further shows that the defendants Sweeny and Clark procured the agreement of your orator to sell his interests in the

"Skookum" mine by covin and fraud, perpetrated in the following manner: That said "Skookum" mine had been reached for working purposes by certain workings known as Last Chance workings, which were in the exclusive control of said Sweeny and Clark, and which lie northeasterly of the "Skookum" claim; that they declared at the time of the agreement by which they took the option to purchase of your orator, that the works of the Last Chance mine had penetrated to the said "Skookum" claim, and that they know that the ground was of little value, and that it contained no ore, and they being in the exclusive control of said workings, and said grounds could not be reached in any other way; they stated that they desired to purchase it, not because it was of any value for its ore, but because it was surrounded by other claims which were of value and would be useful to them for combining it for working purposes with the said other ground and give breadth, bulk and character to their plan to put the consolidation land on the market. That your orator had no means of personal knowledge as to the value of said ground, except its situation with reference to other claims of which he had some knowledge, and relying upon these representations of the defendants Sweeny and Clark, that they had not in their works penetrating said claim found any ore or ore body, and that they had no more information about the same than your orator, he fixed the price of his entire interest in said "Skookum" claim at ten thousand dollars ($10,000.00).

And now your orator shows that the facts were: That the said works penetrating said "Skookum" ground had disclosed an immense body of ore of great value, and that the said Sweeny and Clark willfully falsified and misstated the facts to your orator that they might procure said contract with him and defraud him into making the agreement to sell his said interests, well knowing that he was ignorant of the truth, while they willfully misstated the facts as aforesaid, which were well known to them at the time.

Your orator further shows that the ores contained in said "Skookum" mine are of such value that there has been taken out of said ore body then disclosed in said ground up to the present time ore to the value of not less than one hundred and fifty thousand dollars ($150,000.00) net, over and above the cost of mining, treating, extracting and marketing the same, of which your orator is entitled to the share represented by his interests in said "Skookum" mine heretofore set forth.

Your orator further shows that the defendants Sweeny and Clark, combining with other persons to your orator unknown save as disclosed by the records of said county of Shoshone, have organized under the laws of the State of New York, the corporation defendant in this action, and since about the 15th day of May, 1898, said corporation defendant has been engaged in working and mining the ores contained as aforesaid in said "Skookum" mining claim, under the general supervision and direction of said Sweeny and Clark, who are and have always been officers of said corporation,

and own the majority of its capital stock as your orator states upon information and belief. That said corporation had and has knowledge of the facts as to the frauds practiced by said Sweeny and Clark upon your orator, heretofore alleged, and it and said individual defendants are receiving the fruits thereof; and that the premises in controversy herein are of the value of more than ten thousand dollars ($10,000.00).

That the defendants herein give out and assert, since the record of said deed to said Sweeny and Clark to the one-eighth interest, that they own the "Skookum" claim, and that your orator has no interest therein; that they have many million dollars' worth of ore in sight therein, and that they intend to take the same to their own use; that said described property is of no value, except for the ore it contains, and that the defendants are rapidly exhausting the same to the utter destruction of your orator's rights, for all of which wrongs in the past and threatened in the future your orator has no plain, speedy or adequate remedy at law, and only in a court of equity.

That said defendant company, acting in conjunction with and under the direction of said Sweeny and Clark, are working a force of no less than one hundred miners and workmen in taking the ores of said ground, and despoiling it at the rate that will be destructive to your orator's interests therein, unless they are prevented by this court, which shall by proper order and process preserve the same until the parties hereto shall have a hearing upon the merits.

That the ore body of said "Skookum" mine now being worked and despoiled by the said corporation defendant is approached by a tunnel, passing through the Last Chance mining claim, and penetrating the "Skookum" claim, called the "Sweeny tunnel," and the same is in the possession and control of said defendants, and is the only approach to said working in the "Skookum," and is held under lease executed by the Last Chance Mining Company, its owner, by its president, Charles Sweeny, one of the defendants herein, all of which was done by the authority of the corporation known as the Last Chance Mining Company, a corporation organized under the laws of the State of Washington, and owning the Last Chance mine and other property in Yreka mining district, county of Shoshone, State of Idaho, including the Sweeny tunnel, and the said lease also included that certain mill and concentrator for the concentration of ores for the market from said mine, called the Last Chance mine concentrator, and said defendants are using the same in their said mining operations on said "Skookum" mine and have been during all the time referred to.

The said defendants claim an estate or interest in said undivided one-eighth interest in said "Skookum" claim adverse to your orator which claim of said defendants is without any right whatever, and that said defendants have not any estate, right, title or interest whatever in said land and premises, or any part thereof, the property of your orator, as aforesaid:

Wherefore, your orator prays:

First. That the said defendants, to wit, Charles Sweeny, F. Lewis Clark, and The Empire State-Idaho Mining and Developing Company, a corporation, may each be compelled to answer all and singular the matters set forth and stated in this bill, but not under oath (answer under oath being hereby expressly waived).

Second. That this court appoint its receiver to take into his possession and control the said "Skookum" mine and workings, including the said Sweeny tunnel, and the concentrating mill used therewith, and continue the operations in said mine, under such rules and directions as the court may decree necessary for the preservation of the rights of your orator and those of the defendants, and that said defendants Sweeny and Clark and said Empire State-Idaho Mining and Developing Company, and each of them, be enjoined and prohibited by this court, and all and each of their agents, servants or employees, from in anywise working and extracting any ore therefrom pending the trial on the merits, and until the final determination of the rights of the parties therein.

Third. That the conveyance by your orator to the defendants Sweeny and Clark be set aside and declared null and void from its date; that the defendants be held to account for your orator's share of the proceeds of said "Skookum" mine taken therefrom by the said defendants since said escrow deeds were made to the present time.

Fourth. That said defendants may be required to set forth the nature of their claims to said premises, and that all adverse claims of the said defendants may be determined by decree of this court; that by said decree it may be declared and adjudged that the said defendants, and each of them, have no estate or interest whatever in or to said undivided interest of your orator in said "Skookum" claim, and that the title of your orator is good and valid thereto and therein.

Fifth. That said defendants, and each of them, be forever enjoined and debarred from asserting any claim whatever in or to said undivided interests of said plaintiff in said "Skookum" claim adverse to your orator, and for such other preliminary and final relief as to this honorable court may seem meet and agreeable to equity and for his costs of suit.

Sixth. And your orator further prays that your honors will grant to your orator your writ of subpœna, issuing out of and under the seal of this court to the said defendants Charles Sweeny, F. Lewis Clark, and said Empire State-Idaho Mining and Developing Company, commanding them, and each of them, by a certain day to appear before your honors, in the court aforesaid, and then and there answer these premises and abide the further order and direction of this court herein.

JNO. R. McBRIDE,
Solicitor for Complainant.

C. W. BEALE, Of Counsel.

STATE OF IDAHO, }
County of Shoshone, } ss:

Kennedy J. Hanley, being first duly sworn, deposes and says that he is the complainant in the above-entitled action, and has heard read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

KENNEDY J. HANLEY.

Subscribed and sworn to before me this 9th day of March, A. D. 1898.

(Stamp) [SEAL.]

H. M. DAVENPORT,
Notary Public.

EXHIBIT "A" (TO BILL OF COMPLAINT).

In the Probate Court of Shoshone County, State of Idaho.

In re Estate of DAVID MCKELVEY, Deceased.

The hearing upon the petition of Clarence Cunningham, administrator of the estate of David McKelvey, deceased, for an order for the sale of the real estate belonging to said estate coming on to be heard, and it appearing that an order to show cause heretofore made on the twenty-second day of October, 1896, has been duly published in the "Cœur d'Alene Sun," a weekly newspaper published in the town of Murray, Shoshone county, Idaho, with a notice requiring all persons to appear and show cause, if any they had, why an order should not be made on the 30th day of November, 1896, and no objections having been made, and it appearing that notice to creditors has been duly published as required by law, and that it is for the best interest of said estate that such order should be made:

It is hereby ordered, adjudged, and decreed that the said administrator, Clarence Cunningham, do sell at either public or private sale, as said administrator shall judge to be most beneficial to the said estate, all of the interest of said estate, in and to the following described real estate, to wit:

An undivided one-third (⅓) interest in the "Skookum" Lode mining claim, situated in Yreka mining district, Shoshone county, State of Idaho; an undivided one-third (⅓) interest in the Jersey Fraction Lode mining claim in said county and State, and an undivided one-half (½) interest in a certain lot, situated on the east side of Main street in the town of Wardner, in said county.

It is further ordered, adjudged, and decreed that each of said interests in real estate be sold separately, and that the terms of sale

shall be not less than ninety per cent. of the appraised value, and that notice of said sale be given as required by law.

Done this 30th day of November, 1896.

HENRY S. GREGORY,
Probate Judge.

I, A. D. McKinlay, judge of the probate court of Shoshone county, State of Idaho, do certify that the above is a true copy of the order of sale of real estate in the matter of the estate of David McKelvey, deceased, as on file in my office.

Dated this 17th day of February, A. D. 1899.

[SEAL.] A. D. McKINLAY,
Ex-officio Clerk of the Probate Court of the
County of Shoshone, State of Idaho.

(Stamp.)

EXHIBIT "B" (TO BILL OF COMPLAINT).

STATE OF IDAHO,
County of Shoshone, } ss:

In the Probate Court of said County.

In the Matter of the Estate of DAVID McKELVEY, Deceased.

Order Confirming Sale of Real Estate.

Clarence Cunningham, administrator, of the estate of said David McKelvey, deceased, having *been* made to this court, and filed in the office of the clerk thereof, on the 18th day of June, 1897, a return of his proceeding- under order of sale herein duly verified by affidavit, and said matter after due proof of due notice made and given as required by law, coming on regularly to be heard this 26th day of July, 1897, and upon the proofs adduced, and the court having examined the said return, and heard the testimony of witnesses in support thereof, and it duly appearing to the court that in pursuance of said order of sale said Clarence Cunningham caused notice of the place and time of holding said sale to be posted up in three of the most public places in Shoshone county, in which the land ordered to be sold is situated, and to be published in the "Wardner News," a newspaper printed and published in the county of Shoshone, for three weeks successively next before such sale, in which order of sale and notice the lands and tenements to be sold were described with common certainty, as follows, to wit:

An undivided one-third (⅓) interest in the "Skookum" Lode mining claim, situated in Yreka mining district, county of Shoshone, State of Idaho.

That Kennedy J. Hanley having bid the sum of seven hundred

dollars ($700.00), for said undivided one-third (⅓) interest in said "Skookum" Lode mining claim, said administrator, on the 1st day of June, A. D. 1897, accepted said bid, and sold said real estate to said Kennedy J. Hanley, for the said sum of seven hundred dollars ($700.00); that said sale was legally made and fairly conducted; that seven hundred dollars, the sum bid, is not disproportionate to the value of the property sold; that a sum exceeding said bid at least ten per cent., exclusive of the expense of a new sale, cannot be obtained; that said real estate has been appraised within one year of the time of said sale; that the sum of seven hundred dollars, offered by said Kennedy J. Hanley is more than ninety per cent. of the appraised value of said real estate; and that the said administrator in all things proceeded and managed such sale as by statute in such cases made and provided.

And all and singular the law and premises being by the court here seen, heard, understood and fully considered.

Wherefore, it is by the court ordered, adjudged, and decreed that the said sale be, and the same is hereby, confirmed and approved and declared valid, and the proper legal conveyances of said real estate are hereby directed to be executed to said purchaser by said Clarence Cunningham, administrator of said estate.

Done in open court this 26th day of July, 1897.

JOSEPH F. WHELAN,
Probate Judge.

I, Joseph F. Whelan, probate judge of Shoshone county, State of Idaho, do hereby certify the foregoing to be a true and correct copy of an order made in this court, this 26th day of July, 1897.

[SEAL] JOSEPH F. WHELAN,
Probate Judge and *Ex-officio* Clerk of
the Probate Court.

Recorded at the request of K. J. Hanley, July 27th, 1897, at 9 o'clock a. m.

BARRY N. HILLIARD,
County Recorder,
By CHAS. A. ERVIN, Deputy.

(EXHIBIT "B" CONCLUDED.)

STATE OF IDAHO,
County of Shoshone, } *ss:*

I, Barry N. Hilliard, county recorder in and for Shoshone county in the State of Idaho, do hereby certify that the foregoing copy of order confirming sale of real estate has been by me compared with the original, and that it is a true and correct transcript therefrom, as the same appears of record in Book "L" of Miscellaneous, page 576, records of Shoshone county, Idaho.

In witness whereof, I hereunto set my hand and affix my official seal at Murray, this 12th day of October, A. D. 1897.

[SEAL.] BARRY N. HILLIARD,
County Recorder.

EXHIBIT "C" (TO BILL OF COMPLAINT).

This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions:

If Chas. Sweeny and F. Lewis Clark shall pay unto the said bank for the credit of Kennedy J. Hanley ten thousand dollars ($10,000.00) on or before August 1, 1898, then this envelope with its contents shall be delivered to said Sweeny and Clark; otherwise it shall be delivered to said Kennedy J. Hanley.

Dated at Spokane, Wash., this 20th day of April, A. D. 1898.

CHAS. SWEENY. [SEAL.]
F. LEWIS CLARK. [SEAL.]
KENNEDY J. HANLEY. [SEAL.]

Witness-:
W. E. GOODSPEED.
BRUCE GLENDENNING.

I hereby extend the above escrow to September 20th, 1898. June 7, 1898.

KENNEDY J. HANLEY.

EXHIBIT "D" (TO BILL OF COMPLAINT).

This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions.

If Chas. Sweeny and F. Lewis Clark shall pay into said bank for the credit of Kennedy J. Hanley, eighteen thousand dollars ($18,000.00) on or before July 1st, 1898, then this envelope with its contents shall be delivered to said Sweeny and Clark, otherwise it shall be delivered to Kennedy J. Hanley.

Dated at Spokane, Wash., this 30th day of April, A. D. 1898.

CHAS. F. SWEENY. [SEAL.]
F. LEWIS CLARK. [SEAL.]
KENNEDY J. HANLEY. [SEAL.]

Witness-:
W. E. GOODSPEED.
BRUCE GLENDENNING.

I hereby extend the above escrow to September 20th, 1898. June 7, 1898.

KENNEDY J. HANLEY.

(Endorsed:) Filed this 18th day of March, 1899. A. L. Richardson, clerk. By M. Cozier, deputy.

* * * * * * *

In the United States Circuit Court for the District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE STATE-Idaho Mining and Developing Company (a Corporation), Defendants.

Answer.

Answer of the Above-named Defendants to the Bill of Complaint of Kennedy J. Hanley, Complainant Herein.

The defendants respectively, now and at all times hereinafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as defendants are advised it is material or necessary for them to make answer to, severally answering say:

That as to whether or not the complainant Kennedy J. Hanley, is a citizen of the United States, defendants have not sufficient information upon which to base belief, and therefore deny the same; admit that the said Hanley is a resident and citizen of the State of Idaho, residing at Wardner, Shoshone county, Idaho.

Admit that the defendants Charles Sweeney and F. Lewis Clark are each of them citizens of the United States and of the State of Washington, and residents of the said State of Washington. Admit that the said defendants Sweeny and Clark are officers of the Empire State-Idaho Mining and Developing Company.

Deny that on the 30th day of April, 1898, or at any other time, the complainant was or ever has been, or now is, the owner of eleven twenty-fourths (11-24) of the said mining ground lying in the Yreka mining district, in Shoshone county, Idaho, called the "Skookum" mining claim. Denies that the said complainant has or had at the time of the commencement of this action any title or interest, claim or right in or to the said "Skookum" mining claim, or any part thereof.

Admit that in the month of November, 1896, the estate of one David McKelvey, deceased, was in the probate court of Shoshone county, Idaho, for settlement, and that an administrator was in charge of the property of said estate, and that said estate owned an undivided one-third (1-3) interest in the said "Skookum" mining claim.

Admit that on the 30th day of November, 1896, after regular proceedings therein, the probate court of said Shoshone county, Idaho, made and entered its judgment and decree to the effect that a neces-

sity had been shown to exist for the sale of the said interest of the said McKelvey, deceased, in the said "Skookum" mine, as required by law, and that said probate judge directed that said administrator should proceed according to the provisions of the statute, to offer said property to purchasers, for bids thereon, and that said Exhibit "A" attached to complainant's bill of complaint is a copy of the decree in the premises.

Deny that about the first day of June, 1897, or at any other time, complainant announced to the administrator that he bid for said interest in said "Skookum" mine, or would pay therefor the sum of seven hundred and fifty dollars, if said bid should prove to be the highest and best bid therefor, and that the said bid or any bid of the complainant was afterward or ever reported to the said probate court.

Deny that the said administrator on or about the first day of July, 1897, or at any other time, informed complainant that in response to his offer to receive bids for said interest, in said "Skookum" mine, he had received an offer of seven hundred dollars for the Chemung Mining Company, and that the same was the only other bid aside from the complainant's made therefor, or that the matter of whether the complainant's said alleged offer should be accepted would be heard on some day or any day during the July term of the said probate court.

Deny that the complainant then owned an interest in the said "Skookum" mine, except as hereinafter stated and set forth, or that the complainant was desirous of acquiring any further interest therein, or that he so informed said administrator, or that he stated to said administrator that he would pay more than seven hundred dollars for said interest, the amount of the said Chemung bid, or would abide his bid of seven hundred and fifty dollars.

Deny that afterward or at any time complainant was informed by the said administrator that the hearing as to which of said offers would be accepted would be heard in the probate court on the 26th day of July, 1897, or that said administrator notified complainant to be present at said hearing.

Deny that the said Chemung Mining Company, at the time of making the said bid, or at any time, was without funds in its treasury. Deny that on the 13th day of August, 1897, or at any other time, the said Chemung Mining Company did not have any money or sufficient money with which to make its bid for the said property good. Deny that said company had never at any time authorized or directed said purchase of the said "Skookum" interest to be made by any person for it. Deny that the said bid made by or on behalf of the said Chemung Mining Company for the purchase of the said interest in the "Skookum" mining claim was a sham bid. Deny that said bid so made on behalf of the Chemung Mining Company was made without authority or without the means to make it good, or that said bid was a fraudulent device intended to prevent any sale at the time, contrived by these answering defendants for

purposes of their own as alleged in the complainant's bill of complaint, or at all.

Deny that the complainant, well knowing or knowing at all that the said bid was not the bid in fact of the Chemung Mining Company, or being willing to increase his own holdings in said "Skookum" mine, in pursuance of the invitation of the said administrator to be present on the 26th day of July, 1897, for that purpose, repaired to Murray, Idaho, or appeared in the probate court on said day, or there or then informed the said administrator or the said probate court that he was ready or willing to make his said pretended bid good or pay for said interest in said "Skookum" mine, the sum of seven hundred and fifty dollars in cash, or that said complainant made any bid or ever paid any sum on his own behalf for said interest, or that said complainant made any bid or offered for said interest any sum in excess of the bid or offer made on behalf of the Chemung Mining Company, as hereinafter set forth.

Deny that the said administrator of said probate court then and there informed the complainant that they expected still other bids from other parties, or that for the purpose of giving time to said expected bidders to arrive, the judge of the said probate court, took a recess of the court from 12 m. to 4 p. m. of said day, or any other amount of time, or that there were no other bids than the bid of complainant. Deny that the said Chemung Mining Company put in no appearance or failed to appear at said time by its attorney, A. G. Kerns, or by any other person, representing said company. Deny that said Chemung Mining Company failed to make good its offer by the deposit of the money thereon. Deny that complainant's offer of seven hundred and fifty dollars was the highest bid, or was any bid at all, or was accompanied by any cash. Deny that the said probate court then or there ever confirmed any sale to the complainant or directed said administrator to accept seven hundred and fifty dollars from the complainant or any money from the complainant, or executed any conveyance to the complainant, or that any of said acts or things were done by the said administrator, or that the *complainant the* price or any price to the said administrator, or received a deed or any deed from said administrator, or placed the same on record except as hereinafter stated.

Deny that the Exhibit "B" attached to the complainant's bill of complaint is a copy of any proceedings ever had in the probate court of Shoshone county, Idaho, or that the said Exhibit "B" accurately recites or recites at all any acts or proceedings ever had or done in said probate court, except as hereinafter stated. Deny that the sum of seven hundred dollars recited in said Exhibit "B" is erroneous as to any amount bid or paye*d*, but alleges that said alleged decree Exhibit "B" correctly recites an invalid and illegal proceeding had in said probate court as hereinafter more fully set forth.

Answering complainant's allegations contained in his bill of complaint wherein he alleges that about the 6th day of October, 1897, he was informed by rumor that some proceedings had been had in

said probate court, by which the title which had been conveyed to him by virtue of the proceedings theretofore had in said court on the 26th day of July, was brought in question, and that said administrator had been ordered and directed by said probate court to make another conveyance of said interest in said mine to the said Chemung Mining Company, and had refused to comply with said direction to make said second conveyance upon the ground that he had under the decree of July 26th, 1897, conveyed all the title held by said estate therein and could convey nothing further, and that the Chemung Mining Company brought its action of mandamus in the district court of the first judicial district, in and for the county of Shoshone, State of Idaho, to compel said administrator to execute a conveyance to the said Chemung Mining Company, ordered by said probate court, and that then it was that the complainant was advised of the proceedings which had been had in the probate court in the meantime, and reciting the proceedings had in said probate court, and that the said proceedings were without notice to the complainant in this action and without any knowledge thereof on his part, or that judgment thereon was had upon an *ex parte* showing made by the Chemung Mining Company, these answering defendants allege the truth to be that at all times in said proceedings so instituted in the probate court as aforesaid, for the purpose of setting aside said fraudulent order referred to as Exhibit "B," and in the proceedings for the mandamus in the district court aforesaid, and all of the proceeding- subsequent thereto, the complainant, Kennedy J. Hanley, while not appearing in person or by name, as these defendants are informed and believe, and on such information and belief allege, maintained at his own expense said proceedings and said litigation and defended against the same, employed his own counsel to appear for him, before the district court and subsequently before the supreme court of the State of Idaho as hereinafter more particularly set forth, and had knowledge of all matters and things complained of and of the proceedings had in connection with the said interest in said claim. That all of the acts and things recited by complainant in his bill of complaint as having been had and done in the said probate court toward the cancellation of the said erroneous and fraudulent order, as contained in said Exhibit "B" have been reviewed by the district court of the first judicial district of Idaho, in and for Shoshone county, as hereinafter set forth, and were by said district court confirmed, and the action of the said district court has been reviewed and affirmed by the supreme court of the State of Idaho, as hereinafter set forth, and during all of the proceeding- in the said district court and in the said supreme court touching the validity of the action of the said probate court, in setting aside the fictitious and fraudulent order, Exhibit "B," complainant Kennedy J. Hanley, while not appearing by name, employed counsel to represent his interests and conducted such proceedings on his own behalf, and the said district court and the said supreme court were fully advised of all the facts and the law in the premises, and rendered their

judgment thereon affirming the action of the probate court complained of by the complainant in this action, upon which he bases his pretended claim to the one-third interest in the said "Skookum" mining claim.

Deny that either in the probate court proceedings recited in the complainant's bill of complaint, after the 26th day of July, 1897, or in the proceedings in the district court, were complainant's claim or rights never investigated or presented, but allege the facts to be that in both said courts, and in all proceedings had therein, complainant's claim and rights were fully presented and investigated, and the judgments of the said courts rendered thereon. Deny that complainant was not a party to said proceedings, or that said proceedings were begun secretly in order to exclude the complainant from any part therein, or that they were prosecuted to that end, or any end, without notice to complainant, or without any attempt to make him a party in any way, but allege the fact to be that complainant appeared at all stages of said proceedings, while not in name, by counsel, who fully presented and defended whatever rights complainant had in the premises in said proceedings.

Deny that the defendants, or any of them, have procured any legal or fraudulent proceedings to be taken against the complainant, but allege the fact to be that all proceedings had in connection with said interest in said "Skookum" mine, in either the probate court aforesaid or the district court aforesaid, or the supreme court aforesaid, have been in conformity with the law, and that the real and true facts in connection with complainant's rights and the rights of all parties in the premises have at all times appeared in all of said proceedings.

Deny that the proceedings of the said probate court of date of August 13th, 1897, were without the jurisdiction of their subject matter, or the parties in interest, but allege the fact to be that said probate court had jurisdiction of both the subject matter and the parties in interest. Deny that after the close of the July term, said probate court, it had no power or authority to set aside, in August, 1897, or at any time, the pretended judgment or decree made by it at its former term, as it did on August 13th, 1897. Deny that the complainant was entitled to any notice of the proceedings of August 13th, 1897. Deny that the proceedings of the said probate court, or any of them, whereby the Chemung Mining Company was adjudged to be entitled to a deed for the said interest in the said "Skookum" mining claim, as herein set forth were null and void. Deny that the said decree of August 13th, 1897, was null or that the proceedings thereunder were totally void, or void at all.

Deny that the defendants Clark and Sweeny, or either of them, in any transactions with the complainant, at any time, treated him with bad faith or unfairly.

Deny that pursuant to any negotiations on the 30th day of April, 1898, or at any other time, any contract was entered into by which complainant agreed to execute a conveyance for

his two pretended interests claimed by him in the "Skookum" claim, to wit, one for one-eighth and another conveyance for one-third interest, and placed the same in escrow in said Exchange National Bank of Spokane, or elsewhere, at the price of ten thousand dollars, or any price for the whole, or that it was further distinctly understood or agreed, or understood or agreed at all, that neither deed should be delivered without the payment of the fixed price of ten thousand dollars, or that upon said payment of said sum by Sweeny and Clark within the time specified, or at any time, any envelope containing the two deeds should be delivered to the said Sweeny and Clark by the custodian thereof, E. J. Dyer, the cashier of said bank, and if not paid the same to be returned to the complainant. Deny that the complainant ever executed or placed in escrow two deeds in one envelope, one for a one-eighth interest and one for a one-third interest in the "Skookum" claim, the same to be delivered to the defendants Clark and Sweeny upon any terms whatever, but allege the facts in connection with said matter to be as hereinafter stated.

Deny that at the same, or any time, complainant and defendants Clark and Sweeny placed a second envelope containing a certificate representing one hundred thousand shares of the stock of the said Chemung Mining Company in escrow at the agreed price of twenty thousand dollars, or that the defendants paid before the deposit of said escrow for the said one hundred thousand shares of stock the sum of two thousand dollars, or that there remained to be paid thereon the sum of eighteen thousand dollars, as shown by any indorsement contained upon the outside of any envelope, on August 1st, 1898. Deny that the price of said stock agreed upon by the parties was twenty cents per share, or twenty thousand dollars for the stock. Deny that ten thousand dollars was the price agreed upon for the interest in the "Skookum" claim, or that said sums were severally indorsed upon the outside of the said envelopes, as the price to be paid by the defendants Sweeny and Clark to entitle them to be taken up as in said complaint alleged. Deny that upon the envelope containing the stock the indorsement required eighteen thousand dollars to be paid, or that the said Sweeny and Clark before depositing said envelope had paid two thousand dollars on account of said stock, but allege the truth to be that on said 30th day of April, 1898, said Clark and Sweeny did enter into a contract with the complainant whereby they agreed to purchase from the complainant one hundred thousand shares of the Chemung Mining Company's stock, and an undivided one-eighth interest in said "Skookum" claim for the price or sum of twenty thousand dollars. That the said sum of twenty thousand dollars was to be in full payment for the said stock and the said one-eighth interest, and thereupon there was placed in an envelope certificates for said one hundred thousand shares of the capital stock of the said Chemung Mining Company, and also in the same envelope with said certificate there was placed a deed from the complainant, Kennedy J. Hanley, to said

company for an undivided one-eighth interest in said "Skookum" claim. That upon placing the said stock and said deed for the one-eighth interest in the said envelope and placing the same in escrow in the Exchange national bank, said Clark and Sweeny paid the complainant the sum of two thousand dollars on account of the said sum of twenty thousand dollars. That the terms upon which the said stock and the said deed were to be delivered to the said Clark and Sweeny were indorsed upon the envelope containing said certificate of stock and said deed. That the terms upon said envelope were fully complied with by said Clark and Sweeny and the whole sum of twenty thousand dollars was paid to the custodian of said escrow within the time specified and agreed upon, which said sum of twenty thousand dollars was received by the said Hanley, and appropriated to his own use, and that upon the payment of the said sum of twenty thousand dollars so as aforesaid the defendants Clark and Sweeny took up the said certificate for one hundred thousand shares of the stock of the Chemung Mining Company, and at the same time said deed which was contained in the same envelope with said stock, said deed being for an undivided one-eighth interest in the said "Skookum" mine, and the defendants Clark and Sweeny placed the said deed of record as they of right should do, and transferred said stock to their own use and purpose.

That upon the payment of the said twenty thousand dollars so as aforesaid by defendants Sweeny and Clark, they acquired and became the owners of the said one hundred thousand shares of stock in the Chemung Mining Company, and of the said one-eighth interest in said "Skookum" mining claim.

Defendants Sweeny and Clark further allege the fact to be that about the 30th day of April, 1898, the said Hanley made a fraudulent and fictitious claim to the ownership of an undivided one-third interest in said "Skookum" mining claim, in addition to the one-eighth interest aforesaid, and that the question as to whether or not the said Hanley was the owner of the said undivided one-third interest in said "Skookum" claim was then pending and undecided in the supreme court of the State of Idaho. That these answering defendants requested said Hanley to place a conditional price upon said contested one-third interest in said "Skookum" claim, said price to govern in the event that final judgment in the said proceedings should be in favor of Hanley. The title of the said suit so pending as aforesaid which involved the title to the said one-third interest in the "Skookum" claim, was "The People of the State of Idaho *ex rel.*, the Chemung Mining Company, plaintiff and respondent, *vs.* Clarence Cunningham, administrator of the estate of David McKelvey, deceased, defendant and appellant." That the said Clarence Cunningham had assumed to make a deed to Hanley for the one-third interest claimed by him, and the Chemung Mining Company had commenced said action to set aside said deed and compel said Cunningham to make a deed to said Chemung Mining Company for said one-third interest. That the district court of the first judicial dis-

trict of the State of Idaho, in and for Shoshone county, had entered a decree in favor of the Chemung Mining Company and against Clarence Cunningham, administrator, and ordered said Cunningham, as administrator of said estate, to make a deed to the said Chemung Mining Company for the one-third interest claimed by Hanley in said "Skookum" mining claim, from which said decree said Cunningham had appealed, and said Hanley was the real party in interest represented by said Cunningham, and defendants are informed and verily believe that said Hanley paid the expenses of said appeal, employed counsel to represent said appeal, and was at all times present when said case was being argued both in said district court and in the supreme court of Idaho, and maintained and conducted said litigation. That the said case was pending in the supreme court of Idaho on appeal from the said decree of the district court, from about the 8th day of December, 1897, until the 3d of May, 1898, on which said last mentioned date the said supreme court of Idaho affirmed the judgment of the said district court, which decision is reported in the 53d Pacific Reporter, at page 451 thereof, and decided that no title passed to said Hanley by virtue of the deed made to him by Cunningham so as aforesaid, and thereupon the said Cunningham made application to said supreme court of Idaho for a rehearing of said cause, and on the 13th day of June, 1898, a rehearing was denied and the judgment aforesaid of the district court was finally affirmed, and the said Cunningham was ordered to deliver a deed to the said Chemung Mining Company for the said one-third interest so claimed by Hanley as aforesaid. That it was while said cause was so pending on appeal as aforesaid, in the supreme court of Idaho, that the defendants Clark and Sweeny, acting for the Chemung Mining Company, entered into said agreement with Hanley, by which he placed in escrow said deed for the one-third interest in the "Skookum" mining claim, to be delivered upon payment of ten thousand dollars as aforesaid. That upon the final decision of the said cause in the supreme court of Idaho, wherein it was decided that the said Hanley had no title to the said one-third interest, the defendants Clark and Sweeny or the Chemung Mining Company no longer desired to purchase said pretended interest of the said Hanley, so involved in said litigation as aforesaid, and after said final decision they nor either of them ever contemplated the taking up of said escrow and the payment of the said ten thousand dollars.

Deny that ever at any time the complainant or defendants Clark and Sweeny, or either of them, placed in a second envelope, or in any envelope by itself, a certificate representing one hundred thousand shares of the stock of the Chemung Mining Company, held by the complainant in said company, and placed the same in escrow at the agreed price of twenty thousand dollars, or at any price at all, or that they ever made any payment on said escrow, but allege the facts to be that there was placed in said envelope along with said one hundred thousand shares of stock in the said Chemung Mining

Company a deed from said complainant Hanley to the Chemung Mining Company for an undivided one-third interest in the said "Skookum" lode claim, which said one hundred thousand shares of stock in the Chemung Mining Company, and the said deed for a one-eighth interest in the said "Skookum" mining claim, were by the terms of the said escrow agreement, as indorsed upon the envelope containing said stock, and said deed for a one-eighth interest in the said "Skookum" claim, to be delivered upon the payment of the sum of twenty thousand dollars.

Deny that the price of said stock as agreed upon by the said parties was twenty cents per share or twenty thousand dollars for the said one hundred thousand shares of said stock, or that any price per share was ever agreed upon between said parties for said stock, independent of or disconnected with the price to be paid for said stock and said deed for one-eighth interest as aforesaid. Deny that the price agreed upon for the said interest in the "Skookum" claim was ten thousand dollars, or that said price or said sums were severally indorsed or indorsed at all on the outside of said envelopes as the price to be paid by the defendants Sweeny and Clark to entitle them to be taken up.

Admits that the execution of the two deeds, instead of making a single instrument to convey all of the interest which the said Hanley pretended to have in the said "Skookum" claim was at the instance of the defendants, and alleges the facts to be that the defendants Clark and Sweeny demanded that separate deeds should be made for the one-eighth interest which it was admitted said Hanley owned, and a separate deed for the one-third interest which it was never conceded that the said Hanley owned, and which he was adjudged not to have been the owner of.

Deny that the envelope or any envelope, the one thereof containing two deeds for said "Skookum" mining interests, and the other thereof the certificate of stock in the Chemung Mining Company, were taken to the said bank, or were delivered to the said E. J. Dyer, cashier of said bank, but allege the fact to be that neither of the said envelopes contained two deeds but that one thereof contained the certificate for one hundred thousand shares of the stock of the Chemung Mining Company, together with the deed for the undivided one-eighth interest in said "Skookum" claim, and that the other of said envelopes contained the deed for the undivided one-third interest in the "Skookum" claim, which said Hanley pretended to own, and which ownership these defendants never admitted. That the envelopes as delivered to the said E. J. Dyer, cashier of said bank, in escrow, contained the one thereof said stock and said deed for the one-eighth interest and the other thereof said deed for the said one-third interest.

Admits that at the request of defendants Clark and Sweeny, on the 7th day of June, 1898, complainant extended the time for the payment on the envelope containing the deed for the one-eighth interest in the "Skookum" claim, and the one hundred thousand

shares of stock in the Chemung Mining Company, as aforesaid, until the 20th day of September, 1898, and that the said extension was upon the stock of the said Chemung Mining Company and the deed for the one-eighth interest and not otherwise.

Admit that on the 7th day of June, 1898, complainant extended the time for the payment to be made upon said deed for the one-third interest, so wrongfully claimed by complainant as aforesaid, and not otherwise. Admit that the defendants Clark and Sweeny paid said complainant two thousand dollars on the said seventh day of June, 1898, on account of said escrow, but alleges the fact to be that the said two thousand dollars was paid wholly and solely on account of the escrow containing said one hundred thousand shares of stock and said deed for the one-eighth interest in the "Skookum" claim, and that no part thereof was paid upon any contract for the purchaselof, or on any escrow containing said deed for said one-third interestjin the "Skookum" claim.

Deny that on the 21st day of September, 1898, or at any other time, complainant, upon calling at the said bank, found that said Sweeny, acting for himself and the said Clark, or at all, had opened the envelope containing the deed for the said one-third interest, or had in any manner disturbed same, but admit that prior to September 21st, 1898, the said Sweeny did call at the said bank and did pay the balance of sixteen thousand dollars due upon said escrow contract for the delivery of the said stock and the said deed for the one-eighth interest in the "Skookum" claim which were contained in the same envelope, and did then and there, upon making the said payment, take into his possession said one hundred thousand shares of stock and said deed for the one-eighth interest in the "Skookum" claim, as he had a right to do. That said stock and said deed for the one-eighth interest were upon said date when said payment was made and at all times had been contained in the same envelope, pursuant to the contract, understanding and intention of all the parties thereto.

Deny that the defendants Sweeny and Clark, or any other person within their knowledge, acting for them or on their behalf, ever opened, examined or sought to open or examine the envelope containing said deed for the one-third interest in said "Skookum" claim so deposited in escrow as aforesaid, but allege the fact to be that these defendants had no interest in the said envelope or said deed, after the decision of the supreme court of Idaho holding that complainant had no title upon which to base said deed.

These defendants deny, upon information and belief, that the custodian of the said escrow contracts ever informed complainant that he could not give him any information as to what had become of said deed for the one-eighth interest in the "Skookum" claim, but allege the fact to be that the sealed envelope containing the said one-third interest in the "Skookum" claim had never been unsealed or opened prior to the time when the complainant called upon the custodian thereof as aforesaid, and requested to see the same, and,

on information and belief, allege the fact to be that said custodian, in the presence of the said Hanley, opened said envelope containing said deed for the one-third interest in the said "Skookum" claim, and that the same had never been opened prior to that time, and that said envelope contained no other paper, document or thing than the deed for the said one-third interest in the "Skookum" claim.

Deny that sometime between the thirtieth day of April, 1898, and the said twenty-first day of September, 1898, or at any other time, any deed or deeds was or were ever extracted unlawfully or surreptitiously from said envelopes or at all extracted from said envelope without the consent or knowledge of the complainant, or without the payment of all of the sums of money that under said contract were to be paid thereon, or without doing all of the things on the part of these defendants which they were required to do by virtue of the contract aforesaid, but allege the fact to be that the said deed for the one-eighth interest in the "Skookum" and the said one hundred thousand shares of stock were rightfully and lawfully taken up from the possession and custody of the said Dyer, in strict conformity and compliance with the provisions of the contract under which the same were deposited with him, and not otherwise.

Deny that during all of the negotiations for the sale of complainant's interest in said "Skookum" claim, or during any time, or at any time, it was ever understood that the price fixed upon the same was without any reference to the extent of the complainant's interest, or that the complainant refused to negotiate or contract for the sale of the one-eighth interest only, at any price, unless the whole should be included. Deny that when the bargain resulting in the escrow of complainant's said interests in said "Skookum" claim was agreed to, that it was with the explicit understanding and agreement, or with any understanding or agreement, that the complainant's interest in the "Skookum" claim represented by the two conveyances executed by the complainant to the defendants Clark and Sweeny were to go as one single sale, or that it was separate and distinct from the stock escrow, or that the two deeds were to be placed in a separate envelope for that reason, or that complainant during all of the negotiations, or at any time, or at the time the contract was finally agreed to, or at any time, refused to make any contract for the sale of any interest he claimed in the said "Skookum" claim, unless or except it should be for the whole of what he claimed, or that it should be separate and distinct from the contract for the sale of the Chemung stock, or that the taking of this deed from the possession of the said custodian thereof for the one-eighth interest was a gross or willful fraud, or any fraud, or perpetrated without the knowledge of the complainant or perpetrated at all, or was in defiance or in violation of the contract between said parties. Deny that through fraudulent means the said Clark and Sweeny have obtained an apparent title to the said one-eighth interest in said "Skookum" mine, in violation of their agreement to pay ten thou-

sand dollars therefor, or without any consideration whatever, but allege the fact to be that the said defendants obtained an actual, real and *bona fide* title to the said one-eighth interest in the said "Skookum" claim, in strict compliance with their agreement, and paid therefor the full amount contracted to be paid therefor, and that no act or thing done by the said Clark or Sweeny was against right, justice or good conscience.

Defendants Sweeny and Clark deny that they or either of them procured the agreement with complainant to sell his interest in the "Skookum" mine by covin or fraud, as alleged in complainant's bill of complaint, or in any manner. Deny that the said "Skookum" mine had been reached for working purposes by certain workings known as the Last Chance workings, in the exclusive control of the said Sweeny and Clark, or that they or either of them declared at the time of the agreement, by which they took the option for the purchase of the interest of complainant, that the works of the Last Chance mine had penetrated to the said "Skookum" claim, and that they knew that the ground was of little value, or that it contained no ore, or that being in the exclusive control of said workings, said ground could not be reached in any other way, or that they stated that they desired to purchase it, not because of its value for ore, but because it was surrounded by other claims which were of value or would be useful to them for combining it for working purposes with the said other ground, or give breadth, bulk or character to the plan to put the consolidated land on the market, but allege the fact to be that complainant at all times had a full knowledge as to the extent and character of the workings leading to or within said "Skookum" claim, and of the extent, character and value of the ledge and ores therein, and at *tent, character and value of the ledge or ores therein, and at* all times had free access thereto and to every part thereof. Deny that the complainant had no means of personal knowledge as to the value of said ground, except as to its situation with reference to other claims of which he had some knowledge but allege the facts to be that the complainant had full means of personal knowledge and full knowledge as to the value of said ground at all times. Deny that the complainant relied upon the representations of the defendants Clark and Sweeny, or either of them, that they had not in their works penetrating said claim found any ore or ore bodies, or that they had no more information about the same than the complainant. Deny that the complainant fixed the price of his entire interest in the "Skookum" claim at ten thousand dollars.

Deny that the said works penetrating said "Skookum" claim had disclosed — immense body of ore of great value, or any body of ore of great value at the time of the making of the contract aforesaid, or at the time of the placing of the said deed in escrow. Deny that the said Sweeny and Clark, or either of them, willfully falsified or misstated, or falsified or misstated at all, the facts to the complain-

ant, or any facts to the complainant, that they might procure said contract with him, or defraud him into making any agreement to sell his said interest, well knowing or knowing at all that he was ignorant of the truth, or that they willfully misstated or misstated at all the facts as aforesaid, or any facts which were well known to them at the time, or known to them at all.

Deny that the ores contained in the "Skookum" mine are of such value that there has been taken out of said ore body then disclosed in said ground up to the present time, or up to the time of the commencement of this suit, ore of the value of not less than one hundred and fifty thousand dollars, over and above the cost of mining, treating, extracting and marketing the same, or in which the complainant is entitled to any share or interest therein, but allege the fact to be that there has not been taken from any ore body that was disclosed in said ground at the time of the placing of said deeds in escrow and the making of the contract therefor any ore of any value, and that no ore bodies of known value had been disclosed in said ground at the time of the making of said contract and the placing of said deeds in escrow.

Deny that the defendants Sweeny and Clark, combining with any other persons to the complainant unknown, have organized under the laws of the State of New York, the corporation defendant in this action, but allege the truth to be that said corporation was organized under the laws of the State of New York in strict conformity therewith, without any combination with the said Clark and Sweeny, but in the ordinary and usual course of business. Admit that since the — day of ——, 1899, the said corporation defendants has been engaged in working, and mining the ores contained in the said "Skookum" mining claim; admit that the said Clark and Sweeny, since the organization of said corporation have been officers thereof and stockholders therein. Deny that the said corporation defendant had or has any knowledge of any frauds practiced by said Clark and Sweeny, or either of them, upon complainant. Deny that the said Clark and Sweeny or either of them, have ever practiced any frauds upon the complainant, as alleged in the said bill of complaint, or otherwise, or that the defendants Sweeny and Clark are receiving the fruits of any fraud practiced by any person. The defendants Clark and Sweeny admit that they give out and assert since the record of said deed for the one-eighth interest in said "Skookum" claim, as aforesaid, that they and their grantee, The Empire State-Idaho Mining and Developing Company, the defendant herein, own said "Skookum" claim. Admit that they so give out and assert that the complainant has no interest therein, and allege that said assertion is true. As officers and agents of the said corporation defendant, the defendants Clark and Sweeny admit that they intend, on behalf of said corporation, to extract the ores from the said "Skookum" mine and appropriate the same to the use of the said corporation, the owner of said claim. Defendants deny that they are rapidly exhausting the ores con-

tained in the said mine to the utter destruction of the complainant's rights or to the destruction of any rights of the complainant. Deny that the complainant has no plain, speedy or adequate remedy at law therefor. Deny that the complainant has been wronged or injured or suffered any damages by reason of any act or thing done or omitted by the defendants, or either of them, on account of which he could maintain any action either at law or in equity in any court. Admit that the defendant corporation claims an interest in the said "Skookum" claim, adverse to the complainant, but denies that said claim is without right, and allege the fact to be that the complainant has no interest or estate in said undivided interest in said "Skookum" claim, or any interest in said "Skookum" claim, or at all.

These defendants allege the truth to be that by virtue of good and sufficient mesne conveyances the defendant, The Empire State-Idaho Mining and Developing Company, is now the owner of the said "Skookum" mining claim, and every part thereof.

And these defendants deny all and all manner of unlawful combination and confederacy herewith they or either of them are by said bill charged, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, strictly within the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HEYBURN, PRICE, HEYBURN & DOHERTY,
Solicitors for Defendants.

W. B. HEYBURN, Of Counsel.

Chas. Sweeny makes solemn oath and says: I am one of the above-named defendants. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

CHARLES SWEENY.

Subscribed and sworn to before me this 29th day of April, 1899.
[SEAL.]
W. B. SAMS,
Notary Public.

Service of copy of this answer received this 29th day of April, 1899.

JNO. R. McBRIDE,
Of Counsel for Complainant.

(Endorsed:) Filed May 1st, 1899. A. L. Richardson, clerk. By M. Cozier, deputy.

In the Circuit Court of the United States, District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE STATE-Idaho Mining and Developing Company, Defendants.

Replication.

Replication of Kennedy J. Hanley, Complainant, to the Answer Filed by Defendants.

This replicant, saving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer of the said defendants, for exception thereto saith: That he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that said answer is uncertain, untrue, and insufficient to be replied unto by this replicant. Without this, that any other matter or thing whatever in the said answer contained material or effectual in law to be replied unto, *compassed* and avoided, traversed or denied, is true. All which matters and things this replicant is and will be ready to aver and prove as this honorable court shall direct and humbly prays as in and by his said bill he hath already prayed.

JNO. R. McBRIDE,
Solicitor for Complainant.

Service of the within replication by copy thereof accepted this 29th day of May, 1899.

HEYBURN, PRICE, HEYBURN & DOHERTY,
Solicitors for Defendants.
JNO. R. McBRIDE,
Complainant's Solicitor.

(Endorsed:) Filed May 29th, 1899. A. L. Richardson, clerk. By M. Cozier, deputy.

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In the United States Circuit Court for the District of Idaho, Northern Division

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE STATE-Idaho Mining and Developing Company (a Corporation).

Decree.

This cause came on to be heard at the Sept., 1899, term of this court, held in the city of Boise, Idaho, upon the bill, answer of the defendants, replication of complainant, and the proofs in the case, and was argued by counsel. The court having found that the allegations of the bill are not sustained by the evidence:

Now, therefore, it is ordered, adjudged and decreed that the prayer of the complainant be denied, that he take nothing by this action, and that the defendants be hence dismissed with their reasonable costs, as by them prayed.

Defendants' costs taxed at three hundred and seven dollars ($307.00).

Dated this 15th day of February, A. D. 1900.

JAS. H. BEATTY, Judge.

(Endorsed:) Filed Feb. 15th, 1900. A. L. Richardson, clerk.

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In the United States Circuit Court, District of Idaho.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY ET AL., Defendants.

Opinion.

Jno. R. McBride, for complainant.
W. B. Heyburn, for defendants.

In this action there are involved a one-third and a one-eighth interest in the "Skookum" mining claim, the facts concerning each being different; those applying to the one-third interest are, substantially, that Clarence Cunningham, as administrator, had such interest for sale under probate proceedings; that it was first ordered for sale in the fall of 1896, but no bids having been received which complied with the law, the administrator subsequently offered it, and reported to the probate court "that on the 1st day of June, 1897, this administrator received an offer or bid of seven hundred ($700) dollars for the undivided one-third interest in the 'Skookum' lode

* * * from the Chemung Mining Company; that being the only bid filed with me, and that being the highest and only bid for the same, I did on said date sell said real estate to said Chemung Mining Company, the purchaser thereof, and request that said sale be confirmed." This report of the administrator was not under oath. The 26th day of July, 1897, was finally fixed as the day for consideration of the administrator's report and confirmation of sale. This report is dated June 15th, 1897, and is the only report by the administrator appearing in this record, but the court, in referring to it in its order of confirmation of July 26th, says that the administrator "filed * * * on the 18th day of June, 1897, a return of his proceedings under the order of sale, being duly verified by affidavit," and without referring to any statement made by the administrator as to any bids received, or to whom he sold, as stated in the return, further says "that Kennedy J. Hanley, having bid the sum of seven hundred ($700) dollars for said undivided one-third interest in said 'Skookum' Lode mining claim, said administrator, on the 1st day of June, 1897, accepted said bid and sold said real estate to said Kennedy J. Hanley, for said sum of seven hundred ($700) dollars," and directed that a deed be executed by the administrator to said Hanley, which was thereupon on the same day, done; that on the 13th day of August, 1897, the said probate court made another confirmation order in which it referred to the said report of the administrator, as having reported the sale as made to the Chemung Mining Company, and to its order of July 26th confirming the sale to Hanley as "obtained by misrepresentation and fraud upon the part of said Hanley," and then proceeded to further order that the order of July 26th, confirming the sale to Hanley be set aside; that the deed made him be held null and void; that the sale to the Chemung Mining Company be confirmed; and that the administrator execute a deed to said company; that the administrator declining to comply with said last order, the Chemung Mining Company, on September 30th, 1897, commenced its proceedings in the State district court against him to compel him to make such deed; that on November 18th, 1897, that court ordered that peremptory writ of mandate issue to said administrator requiring him to make and deliver to said Chemung Mining Company, a deed for said one-third interest, and this order was, upon appeal by said administrator, affirmed on the 13th day of May, 1898, by the State supreme court, and a rehearing thereof by said court denied on the 13th day of June, 1898. (The People *ex rel.* Chemung Mining Company, respondent, *vs.* Clarence Cunningham, administrator, etc., defendant, 53 Pac. 451.)

It further appears that on the 17th day of October, 1898, this complainant commenced his action in the State court against the same parties made defendants in this action, and while the allegations in that action and in this are differently formulated, they are, in effect, substantially the same, and substantially the same relief is asked in each, a part of which being the appointment of a receiver for the property in dispute; that on the 9th day of January,

1899, the State district court made an order for the appointment of a receiver, whereupon the defendants in that case, on January 12th, 1899, petitioned the State supreme court for a writ of certiorari to review the action of the district judge, which, being granted by said supreme court, it, upon hearing, did on the 30th day of January, 1899, reverse the action of the district court in the appointment of a receiver (Sweeny *et al. vs.* Mayhew, 56 Pac. 85); and thereafter the complainant dismissed his said action in the State court, and on the 18th day of March, 1899, commenced this action.

Concerning the one-eighth interest, complainant claims that he executed two separate deeds for the one-third and the one-eighth interests, which were to be placed in one envelope and deposited in escrow to be delivered to defendants, upon the payment by them of ten thousand ($10,000) dollars, and in another envelope to be deposited in escrow were to be placed a hundred thousand (100,000) shares of the stock of the Chemung Mining Company, to be delivered to defendants upon the payment by them of twenty thousand ($20,000) dollars; that defendants so manipulated the papers and envelopes as to place in the envelope with the stock the deed for the one-eighth interest, and in the other the deed for the one-third interest, and upon the payment of the twenty thousand ($20,000) dollars, defendants received both the stock and the deed for the one-eighth interest. The defendants claim this was according to their agreement. The escrows upon the envelope were signed by all the parties, but did not state the contents of the envelopes. Also complainant claims that he was induced, through the fraudulent misrepresentations of defendants as to the condition of the mine, to sell this one-eighth interest.

The decision of this controversy is accompanied with very much doubt and embarrassment. Upon every important issue, the testimony is so contradictory that the truth, if discovered at all, must be culled from a maze of doubt. Some of the witnesses, though not legally impeached, have been severely criticised by counsel, but the testimony of all must be considered in the light of the circumstances, including their interest in the result. All the questions involved herein have been, in some form, considered by the supreme court of the State, and this court is now asked by complainant to reach a contrary conclusion to that found by such court.

Certainly the transfer of this one-third interest through probate proceedings was accompanied with much irregularity at least. It appears from some of the testimony that prior to the time when the administrator made the offer of sale, under which this interest was finally sold, that complainant had made a bid of seven hundred ($700) dollars for it, but this offer was not considered. In pursuance of the subsequent offer the record shows beyond any dispute, by the report of the administrator of June 15th, that the Chemung Mining Company, on June 1st, bid the sum of seven hundred ($700) dollars; that this was the only bid, and that it was accepted and the property sold by the administrator to the company, subject only to

the approval of the probate court. The copy of the written bid of the company, clearly proven, appears in the record, and it is also shown that the company had made prior arrangement with its attorney, Mr. Kerns, for the purchase of the property. So far as appears, it seemed to be fully understood, up until the 26th day of July, that the sale was to the company, and its attorney seemed to consider the matter so settled that he did not on that day attend the meeting of the court, but asked Major Wood, while in Murray, to attend for him. Just what occurred on that day is not clear from the testimony, but it appears that in the forenoon there were present at the office of the probate judge, the judge, administrator, complainant, and Major Wood, who says in his testimony that at this meeting the administrator said to him that there had been a raise of fifty ($50) dollars upon the bid then in; that it was by the same bidder who had voluntarily raised his bid; that the administrator asked the witness to prepare the deed, to which he replied, he would have Mr. Kerns to attend to it, and that there was nothing said about making a deed to Hanley, nor was he spoken of as a bidder. It seems evident from the testimony of this witness that the mentioning of the name of the original bidder was avoided, and was referred to only as the "original bidder," and that the impression left with him was that the Chemung Mining Company was referred to as such bidder, and that the deed was to be made to it, to which there appeared no opposition, and that he left for his home with such impression, and with the intention of having the company's attorney, Mr. Kerns, prepare the deed for the administrator. Final action was deferred by the court until later in the day because of the request of some heir as stated, and when the order of confirmation was made it stated that Hanley had, on June 1, 1897, bid seven hundred ($700) dollars, which, let it be remembered, was not true, and from the report of the administrator, then on file, must have been known to the court to be untrue, and thereupon the deed was made to Hanley.

The order of revocation and confirmation made August 13th, the probate judge says, was made against his will and under protest. Even if it was not valid, in view of the fact that it was held under consideration sufficiently long to have been carefully examined and understood, its recitals in the nature of facts must be taken as true, except where disputed by the record, for if they were not true the judge could have modified them and still have accomplished the object of the order. It says that, on the 26th day of July Hanley appeared "in person, representing himself to appear on behalf of the purchaser at the administrator's sale," which is then stated to have been the Chemung Mining Company, and that the confirmation made on July 26th to Hanley "was obtained by misrepresentation and fraud on the part of said Kennedy J. Hanley, in pretending to represent the said Chemung Mining Company." These statements, if not true, could have been avoided; that they are solemnly made by the party, who of all knew best whether they were true or false, is almost conclusive evidence of their truth.

Now, with all the facts and circumstances above stated before the court, can it, under any rules of weighing evidence, safely reach the conclusion that the transaction by which, on July 26th, the conveyance was made to complainant, was fairly and honestly performed, and is not the conclusion compelled that it was so tainted by deceit, concealment and fraud, that complainant cannot now appeal to a court of equity to confirm whatever title he then procured?

It is, however, insisted that the order of July 26th, is a solemn judgment and decree of that court which imports such absolute verity that it is not here assailable, while with equal fervor it is insisted that the judgment of the same court made on August 13th, is fraudulent, and that as fraud vitiates whatever it touches, it is void. It is unnecessary to determine whether that former judgment is valid or not, for if the court is convinced that in its procurement there was any unfairness or fraud, it is not bound to sustain it, but rather should leave the complainant without its support.

Without attempting to consider further the merit of that transaction, attention is called to the act of the supreme court of the State which investigated the same and reported its conclusion in 53 Pac. 451, *supra*. Among the objections made by the complainant's counsel to a consideration of this case here are, that complainant was not a party to that action; that there was not a full investigation of the fact, and that it was not in a legal sense *res adjudicata*. The complainant was not *eo nomine* a party, but his interests were fully represented by the same able counsel who appears for him here, and while the facts are not as elaborately stated there as here, all the salient ones are, and even if they were not, the opportunity was such that all, necessary to fully advise the court, could have been presented. It is true that the decision cannot be considered *res adjudicata*, but the views expressed by the court upon questions, under consideration here, would at least be worthy of consideration; but are they not more than simply persuasive? The court has placed its construction upon the statute of the State; it has declared what the law of the State is, that is a *res adjudicata* of that matter, not alone applicable to that case and the parties thereto, but applicable to all parties in any case when the statute in question is involved. It is section 5491, Revised Statutes of Idaho, which is as follows:

"No sale of any property of an estate of a decedent is valid unless made under order of the probate court, except as otherwise provided in this chapter. All sales must be reported under oath and confirmed by the probate court before the title of the property sold passes." The court, after stating the facts of the bid by the Chemung Mining Company, and the report thereof by the administrator as stated, *supra*, then says: "There was no return of a sale to Hanley, and the order confirming a sale to him was void.

"Said section 5491, Revised Statutes, is mandatory, and until a sale is reported under oath the court has no basis for an order confirming a sale. No title can pass until at least two steps are taken,

to wit: A return of sale made under oath and its confirmation by the court."

Now, must this court follow the rule there established? Counsel for complainant insists that the decision is contrary to the weight of authority, including that of the United States Supreme Court. On the contrary, it is the established practice that the courts of the General Government keep in harmony with the State courts in their construction of State laws, except where such laws are concerning generally established principles of commercial law, or questions of general jurisprudence, or attempt to regulate the jurisdiction of the United States courts, and under certain circumstances in cases of contracts entered into prior to any construction by the State courts of the statutes upon which they are based, the United States courts will exercise an independent judgment. These, however, are exceptions to the general rule, which is forcibly expressed in Forsyth *vs.* Hammond, 166 U. S. 506–518, where it is said: "The construction by the courts of a State of its constitution and statutes is as a general rule binding on the Federal courts. We may think that the supreme court of a State has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

This seems to be a case in which this court may consider as its guide the construction given the statutes by the State court.

It may be here suggested that as the return of sale to the Chemung Company made by the administrator is not under oath, by the rule of the State court, the deed to the company would also be void unless that return is remedied by the recital in the order of confirmation of August 13th, that it was "duly verified."

Concerning the one-eighth interest, complainant has testified that prior to April 30th, 1898, some negotiations passed between him and defendants proposing his sale to them of his stock in the Chemung Company and his interest in the "Skookum" claim; that about that date he went to Spokane at their request, and on April 30th made them a written proposition as follows: "My proposition is this: I will sell my one hundred thousand (100,000) shares in the Chemung Company (at 20 cents a share) for twenty thousand dollars ($20,000). I will sell my one-third and one-eighth interest in the "Skookum" claim at the rate of thirty thousand — ($30,000) for the whole claim. (Signed) K. J. Hanley, Spokane, April 30, 1898." That his desire was to sell all, and not a part, of his "Skookum" interest, that after some further negotiations he agreed to take ten thousand ($10,000) dollars for such interest, and twenty thousand ($20,000) dollars for the stock; that at defendants' request he made two separate deeds for his one-eighth and one-third interests; that it was then near 12 m. on Saturday, and as the banks were about to close they were greatly hurried; that he and defendants went to the bank, where he acknowledged the deeds, and while they were all present he says Sweeny took the deeds, and that he, Hanley, did not see them put into the envelopes; in effect, that he allowed the other

parties to handle them; that they were then deposited with the bank as escrows; that he saw no more of them until the time came for taking up the escrows; and that then he went to the bank and found that the money had been paid for the stock, but not for the mining interests; that on having the deed escrow handed him he found that the deed for the one-eighth intererst was not there, but only that for the one-third, and he refused to accept it because both deeds were not there.

Witness Presley, for complainant, testified that Sweeny told him early in May that he had secured an option on Hanley interest in the Chemung for twenty thousand ($20,000) dollars, and his interest in the "Skookum" for ten thousand ($10,000) dollars, which witness understood to be one-third and one-eighth, which is denied by Sweeny. Defendant Clark testifies that complainant made his written proposition; that he, Clark, told him they wanted his stock and the one-eighth interest; that defendants considered the Chemung company already owned the one-third interest, and that he thought the court would so hold; that they agreed upon a price of twenty thousand ($20,000) dollars for the stock and one-eighth interest to be in one escrow, and ten thousand for the one-third interest to be in another; that in order that there should be time for the supreme court to render its decision concerning this one-third interest the date of the escrow for the same was made August 1st, while that of the other escrow was made July 1st; that while he, Sweeny, and Hanley were standing together at the bank, Sweeny, by motion, calling Hanley's attention, put the stock and deed, for the one-eighth interest in one envelope, and the deed for the one-third interest in another, and sealing them up, gave them to the cashier; that on June 7th, 1898, he told Hanley that they should like to get the time on those escrows extended; that when Hanley agreed to extend the time, he said that he would extend the time on the one-third; also because he wanted to keep up a show of contest. Defendant Sweeny's testimony corroborates that of Clark.

While the witnesses directly contradicted each other on most of the vital points there are a few facts established which greatly aid in reaching a conclusion. In favor of the complainant's contention, it is shown that at least in the beginning of the negotiations his object was to sell his entire interest in the "Skookum," and he manifested his surprise when he went, on September 21st, to take up the escrow to find but one, instead of two deeds. He seemed, however, to be prepared for something wrong, for he had a few days before guarded the keeper of the escrow against treachery on the part of the defendants. But the making of two separate deeds by complainant is strongly against his contention, that his contract was only for the sale of his entire interest. Why he should do such an unusual business act as to make two separate deeds, when both interests were included in the sale, has not been satisfactorily explained.

That the escrow for the one-eighth interest was made due July 1st, while that for the one-third was made due August 1st, as shown by

the escrows, and as Clark explained to give time to get the decision of the supreme court concerning such one-third interest, is a most important fact. When the extension on these escrows was asked on June 7th, the case was still pending in the supreme court upon a motion for a rehearing. The conclusion is, that complainant, upon whom the burden rests, has not made his case by even a preponderance of evidence, but he bases his action upon alleged fraud, upon the part of the defendants. "In all proceedings instituted to recover moneys or to set aside and annul deeds or contracts, or other written instruments on the ground of alleged fraud practiced by a defendant upon a plaintiff, the rule is of long standing, and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial, but it must be persuasive. A mere preponderance of evidence which at the same time is vague and ambiguous is not sufficient to warrant a finding of fraud and will not sustain a judgment based upon such finding." (Lalone *vs.* United States, 164 U. S. 255–257.)

Was the complainant induced to sell this interest by reason of any fraudulent misrepresentations of defendants as to the condition of the Skookum claim? There is no duty that the court would perform with more alacrity and pleasure than annulling any contract into which a party has been misled through fraudulent misrepresentations upon which he relied. The complainant seems to be a mining man of mature years and of experience. He says he did not ask defendants for admission to the mine because he thought he would be refused. If he was suspicious that there was concealment, this was sufficient to put him upon his guard and to have refused to deal with defendants until permitted to inspect what he was selling, and especially would we expect that he would have been upon his guard with them, when it is remembered how often he has made it appear in this record, that in his opinion they are unreliable. The rule above stated as to the burden of proof and the degree of evidence is also applicable here. In view of all these facts and his allegations in his complaint, "that owing to previous business transactions and relation with the said Sweeny and Clark, in which he had regarded them as having treated him with bad faith, he was anxious to close out his interests and avoid all further business complications or dealings with them," my conclusion is, that complainant was not only able to take care of himself, but that he felt that he was; that he understood the situation fully, and dealt with defendants upon his own judgment, and from his desire to sell his property and that he did not rely upon their representations and was not deceived by them.

Something has been said by counsel as to whether the apex of this ledge is within the "Skookum" claim; while that is not a question for decision here, it certainly is true that complainant has not suffered if the apex is not so situated, and that it is not, seems a pos-

sibility from evidence with which the court is familiar in other cases tried before it.

While the entire record in this case has been carefully examined, the great length of this is sufficient apology for not here going more fully into details of all the questions which counsel have so carefully and ably placed before the court.

The decree now ordered is, that the prayer of the complaint be denied, and that defendants be hence dismissed with their reasonable costs as by them prayed.

Dated December 30th, 1889.

BEATTY, Judge.

Thirty days after notice of the foregoing conclusion is allowed counsel to take such further action in the case as may be desired.

[Endorsed:] No. 148. United States circuit court, district of Idaho. Kennedy J. Hanley *vs.* Chas. Sweeny *et al.* Opinion. Filed Dec. 30th, 1899. A. L. Richardson, clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

KENNEDY J. HANLEY, Appellant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and EMPIRE STATE-IDAHO Mining and Developing Company, Appellees.

Opinion U. S. C. C. A.

Appeal from the Circuit Court of the United States for the District of Idaho, Northern Division.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, circuit judge, delivered the opinion of the court.

This was a suit in equity brought by the appellant, as complainant, to obtain a decree annulling two certain deeds made to the defendants Charles Sweeny and F. Lewis Clark—one by the administrator of the estate of one David McKelvey, deceased, under an order made in a proceeding in mandamus, for an undivided one-third interest in the Skookum mine, situated in Shoshone county, Idaho, and the other by the complainant himself to the defendants Sweeny and Clark for an undivided one-eighth interest in the same mine. The complainant also by his bill asked for an accounting of the profits derived by the defendants from working the mine, and also sought an order appointing a receiver to take possession of and operate the property pending the litigation. The claims of the complainant in respect to the two interests rest upon distinct and independent grounds. The one-third interest belonged to David Mc-

Kelvey during his life. The record before us shows that that interest was first appraised in the proceedings had in respect to the estate of McKelvey at three thousand dollars, and that the complainant Hanley and the defendants Sweeny and Clark all wanted to get it. The Chemung Mining Company is also a factor in the case. That company was incorporated under the laws of the State of Washington, by the defendants Clark and Sweeny and one W. E. Goodspeed, who, it appears from the evidence in this case was a clerk in their office at Spokane—its articles of incorporation bearing date August 5, 1896, and its capital stock being declared to be $2,500,000, divided into 500,000 shares, of the par value of $5 each. On the 11th day of August, 1896, an agreement in writing was entered into between the complainant Hanley, as party of the first part, and the defendants Clark and Sweeny, as parties of the second part, and witnessed by W. E. Goodspeed, by which Hanley, in consideration of the sum of $5,000, paid and to be paid in certain specified amounts and at certain specified times, undertook to sell to Clark and Sweeny an undivided one-fourth interest in those certain mining claims described as follows, to wit: "The Jersey Fraction mining claim, the Lily May mining claim, the Carriboo mining claim, the Good Luck mining claim, and the Butte mining claim, all situate at Wardner, Yreka mining district, Shoshone county, Idaho, and west of the Last Chance mining claim"—the agreement proceeding to provide as follows: "The party of the first part also agrees that all of the title to these properties shall be cleaned up by him, and that said properties shall then be deeded to the Chemung Mining Company of Spokane, Washington, the owners of which shall be as follows: Chas. Sweeny, one-half interest of said company, F. Lewis Clark, one-fourth interest of said company and Kennedy J. Hanley, one-fourth interest of said company. The parties hereto agree to set aside one-fifth of their holdings of the stock of said company, respectively, to be used for treasury purposes. The money to clean up the title of the said properties, not to exceed the sum of five thousand dollars, to be furnished by the parties of the second part in sums as required, under the direction of Chas. Sweeny." The undisputed evidence in the present case is that of the five hundred thousand shares of the stock of the Chemung Mining Company, Hanley owned one hundred thousand shares, Clark and Sweeny three hundred thousand shares, and that one hundred thousand shares were held as treasury stock of the company. The Skookum was a neighboring mining claim, the interest of the McKelvey estate in which, the evidence leaves no room to doubt, Hanley, Clark and Sweeny wanted to acquire and wanted to get for as near nothing as possible. This is shown, not only by the testimony of each of them, but by documentary and other evidence that we find in the record, a part of which will be mentioned. The order of the probate court, under which the McKelvey interest in the Skookum mine was undertaken to be sold and conveyed by the administrator of the estate, is referred to in the brief of appellant's counsel, and in parts of the

record, as having been made December 5th, 1896, although the order itself appearing in the record purports to have been made November 30, 1896. Clark and Sweeny were the principal officers of the defendant Empire State-Idaho Mining and Developing Company, of which one W. Clayton Miller was resident manager and consulting engineer. A. G. Kerns was the attorney of the Chemung Mining Company. On the 14th day of December, 1896 (but a few days after the making of the order by the probate court of Shoshone county for the sale of the McKelvey interest in the Skookum mine), Clark wrote to Miller as follows: "I have tried for three days to get you by telephone but have failed. After full consultation with Mr. Hanley, it seems to me if he can buy McKelvey's claim on the Jersey for about the sum net to us, viz., $400, that he expects to get it for, it better be done now on general principles and to get through with it, and if at the same time he can, by paying $100, so obtain an option on one-third of the 'Skookum,' at about $700, so much the better. It does not seem to me, however, that we better put off too long in getting the Jersey interest cleaned up. I should not want to enter into an agreement to buy the 'Skookum,' but would be willing to pay one hundred dollars or so to get an option on the interest. If you and Mr. Hanley think best, however, to postpone the Jersey matter, I shall be satisfied to rest upon your judgment."

Following this letter in the record, but without date, is the following: "My Dear Kerns: Mr. Clark appears to have changed his mind, and I think now the best you can do is to put Kennedy (Hanley) onto the best and quickest way for him to close for the interest at his bid. He should, at the proper time, put it in as writing. As to the 'Skookum,' find out and let me know, but do nothing now. Miller."

Immediately following is this telephone message from Clark to Hanley: "Mr. Miller telephoned requesting that you immediately telegraph or telephone Cunningham (who was the administration of the McKelvey estate) *withdrawing* your bid on the Jersey tract. By so doing, Miller says we can get a reappraisement to better advantange. Please *comply*. Just withdraw your bid and give no reasons. You can telephone me at my house, 255, after 6:30 p. m."

At the time of the making of the order by the probate court of Shoshone county, authorizing the administrator of the McKelvey estate to sell its interest in the Skookum mine, the interest stood appraised at the sum of three thousand dollars. Hanley had bid therefor the sum of seven hundred dollars. The statute of Idaho provided that no bid should be accepted which was less than ninety per cent. of the apraised value of the property. No other bid appearing to have been made, the McKelvey interest in the Skookum mine was again appraised in February, 1897, and that time at seven hundred and sixty dollars. The administrator of the estate again published and posted notice that he would sell the interest on May 1st, 1897, and invited bids therefor. In his return to the probate court of the sale made by him, the administrator, after setting out

the notices that he caused to be published and posted, stated, "That on the first day of June, 1897, the administrator received an offer or bid of seven hundred dollars for the undivided one-third interest in the Skookum lode *mining*, situated in Yreka district, Shoshone county, State of Idaho, from the Chemung Mining Company; that being the only bid filed with me and that being the highest and only bid for the same, I did on said day sell the said real estate to the said Chemung Mining Company, the purchaser thereof, and request that said sale be confirmed; and further, that the court fix a date and place for a hearing upon said sale." This return was made and filed June 15th, 1897, but was not verified, as was required by the Idaho statute. On the 18th day of June following, an order was made by the probate court designating June 30, 1897, at 10 o'clock a. m. of that day, at its courtroom in the town of Murray, Shoshone county, as the time and place for the hearing of the return, at which any person interested might appear and file written objections to the confirmation of the sale. That hearing was continued to July 26th, 1897, on which day Hanley and the administrator appeared in court, as also W. W. Woods, who had theretofore been the attorney for the administrator in the matter of the estate of McKelvey. Hanley's testimony is to the effect that after the making of the $760 appraisement and after the publication of the notice of sale pursuant to that appraisement, he presented to the administrator a bid of $700 for the McKelvey interest; but such a bid, if made, does not appear among the files of the estate in the probate court, and has not been produced. As a matter of fact, however, the night before the 26th day of July, 1897, Hanley gave to the administrator $750, which he said was a raise of $50 on his bid. The paying of this money in advance of any confirmation of the sale and before the petition of the administrator for its confirmation to the *Chemung Company* had come on for hearing, is one of the many peculiar circumstances attending the attempted disposition of the McKelvey interest. Concerning what took place the next day, July 26th, when the matter of the sale came up before the probate court, there is some conflict in the testimony. The bid of the Chemung Mining Company was submitted to the administrator by A. G. Kerns, its attorney, who resided at Wallace, Idaho, and who had an office with Mr. Woods at that place, and who requested Mr. Woods to attend the confirmation proceedings at Murray, the county seat, (to which place he was going), and look after the bid of the Chemung Company. Woods' testimony is to the effect that he went into the office of the probate judge for that purpose in the forenoon of July 26th; that Cunningham, the administrator, and the probate judge were there; that subsequently Hanley came in, "but," said the witness, "the first inquiry addressed to me was by Mr. Cunningham (the administrator), who stated that there had been a raise of $50 upon the bid then in. And he and Judge Whalen (the probate judge) wanted my opinion as to what to do in the matter. I inquired as to whether the advance was by the same bidder, and Mr. Cunningham

replied that it was the same bidder and that he had voluntarily raised his bid $50. I said, 'That is a rather queer proceeding,' and I took down the statutes and called their attention to the provisions of the statute that if a bid was not raised to the extent of ten per cent., it would not require a new publication. I said, then, in my opinion there was no objection to the administrator taking $50 more for the benefit of the estate, if it was the same bidder, and that my advice to the probate judge would be to confirm the bid as made and not mention that $50; and my advice to Cunningham, as administrator, was to take it up on his account for the benefit of the estate and confirm the bid which was already in writing. That is all that I remember of that transaction, except they agreed to act upon the advice. The administrator and the probate judge both agreed upon that course of conduct." The witness further stated that the administrator requested him to have a deed prepared when he returned to Wallace, and he replied that he would speak to Mr. Kerns about it. As a matter of fact, the probate judge himself, on the same day, to wit, July 26th, 1897, prepared an order confirming the sale to the complainant Hanley, and he testified in this suit that when he was making out that order Hanley, Woods and the administrator were all present, and that while doing so he asked in the presence of all three of them, "Whom will I make this out to?" and that Hanley replied, "Make it out to me; it is my own money that is paying for it," and that Woods assented thereto. If that testimony of Hanley is true, Woods could not be a man of honor and integrity, as complainant's counsel here concedes him to be; for he attended the confirmation proceedings at the request of the attorney of the Chemung Company and for the purpose of having the sale confirmed to it in pursuance of its theretofore accepted bid. Woods' testimony is to the effect that nothing of the kind occurred. The probate judge signed the order confirming the sale to Hanley, and the administrator thereupon executed a deed to him purporting to convey to him the one-third interest of the estate in the Skookum mine. The 26th day of July, 1897, was a day of the regular July term of the probate court of Shoshone county—section 3843 of the Revised Statutes of that State providing that "the terms of the probate court in the several counties for the transaction of all probate business, except that specially authorized by law to be done in vacation, must be held on the 4th Monday in each month. For the transaction of all civil, other than probate business, and all criminal business, these courts are always open." The next section is as follows: "The terms of the probate court must be held at the county seats. There shall be a clerk of said court, to be appointed by the judge thereof, or the probate judge may act as clerk of his own court. Every probate judge shall be responsible upon his official bond for every default or misconduct in office of his clerk." On the 12th day of August, 1897, Kerns, who had presented the bid on behalf of the Chemung Mining Company, appeared at the office of the probate judge and stated to him that a mistake had been made in confirming the sale to

Hanley, and that the Chemung Mining Company was the party entitled to the deed; that Hanley's conduct and representations by which he had procured the confirmation and deed to himself were fraudulent. And Kerns presented to the probate judge an order reciting, among other things, that the matter of the confirmation of the sale came on regularly to be heard July 26th, 1897, the administrator appearing in person and by his attorney, W. W. Woods, and "Kennedy J. Hanley appearing in person, representing himself to appear on behalf of the purchaser at the administrator's sale; and the court, having examined the said return and heard the testimony of witness in support thereof," and it duly appearing to the court that in pursuance of the order of sale the administrator caused the proper notice to be posted and published and that the sale was made to the Chemung Mining Company, and further reciting "That on the 26th day of July, 1897, an order was made by this court confirming the sale of said real estate and mining premises in one Kennedy J. Hanley and directing said administrator to execute proper and legal conveyance thereof to said Hanley upon the same bid of $700; and it appearing to the satisfaction of the court that such order confirming said sale in Kennedy J. Hanley was obtained by misrepresentation and fraud upon the part of said Kennedy J. Hanley in pretending to represent the said Chemung Mining Company," proceeded to vacate and annul such order and deed and to confirm the sale to the Chemung Mining Company and to direct the administrator to execute a conveyance of the McKelvey interest to that company. The probate judge at first refused to sign the order so requested by Kerns, but subsequently, being urged to do so, and, as he testifies, being threatened by Kerns with a suit if he did not, affixed his signature to the order, without any notice to Hanley and without any proof of any kind. The order was then left with the probate judge, who, under the provisions of the Idaho statute, acted as clerk of his own court, and who subsequently advised the administrator that the order so signed was void. The administrator, upon demand made on behalf of the Chemung Mining Company, refused to execute a deed to it for the interest of the McKelvey estate in the Skookum mine, and thereupon that company applied to the district court of Shoshone county for a writ of mandamus to compel the administrator to make the conveyance directed by the order. The district court decided that it was the duty of the administrator to obey the order of August 13th, 1897, and the supreme court of the State, on appeal, affirmed the judgment. (Cunningham *vs.* People, 53 Pac. Rep., 451.) The administrator having, subsequent to the decision of the district court, deposited a conveyance, as required by the statute of the State, to abide the appeal, that conveyance was, after the decision of the supreme court, delivered to the Chemung Mining Company, and was put on record in the county in which the property is situated, and its title, if any, was thereafter conveyed to the defendant Empire State-Idaho Mining and Developing Company.

In the view we take of the present case, it is not necessary to consider the legal effect of the very peculiar proceedings in the probate court, nor to determine the effect of the decisions of the State courts of Idaho in the cases growing out of them which have been brought to our attention; for we are clearly of the opinion that in respect to the McKelvey interest the complainant is not, by the facts and circumstances of the case, presented in such an attitude as that a court of equity should afford him any relief in respect to that interest. The evidence leaves no room for doubt that the intent of the complainant and of the defendants Clark and Sweeny was to acquire the group of claims of which the Skookum was one, in common ownership, although in different proportions. The three were the sole owners of the stock of the Chemung Mining Company, which company bid $700 for the interest of the McKelvey estate in the Skookum mine. Of that bid the administrator, of course, had actual notice, for it was made to him, and in his return to the probate court he expressly stated that under the proceedings had pursuant to the $760 appraisement of that interest, he had sold it to the Chemung Mining Company and asked the confirmation of the sale to it; and, furthermore, the administrator in his return expressly stated that the bid of the Chemung Company was the *only* bid he had received for that interest. Hanley, like every one else dealing with the administrator in respect to that interest, is certainly chargeable with *constructive* notice of the matters stated in that return, and we think the circumstances of the case irresistibly lead to the conclusion that he had *actual* notice of the bid of the Chemung Company and that the administrator had reported to the court his sale of the interest in question to that company. Otherwise, why should he have paid to the administrator $750 the night before the day the hearing of the administrator's petition for the confirmation of his reported sale to the Chemung Company for $700 was to be had? Hanley claims to have himself theretofore made to the administrator a bid of $700 for that interest, which bid, however, nowhere appears among the papers of the estate, nor was it produced in this case; and the administrator, in effect, reported to the court that no such bid had been received by him, for, as has been seen, he expressly stated in his return that the only bid he received for the property was that of the Chemung Mining Company. If it be true, as claimed by the complainant, that he had in fact, bid $700 for the McKelvey interest under and pursuant to the order of sale of November 30, 1896, and it be further true that Hanley did not, in fact, know of the bid of the Chemung Company, then and in that event his voluntary raise of his own bid, in the absence of any other, is "peculiar" to say the least. In that view his action has not been and cannot be satisfactorily explained, unless it be based upon some sort of philanthropic motive, which, under the facts and circumstances of the case, we would hardly be justified in attributing to either him or the defendants Clark and Sweeny in their effort to acquire the McKelvey interest. If, on the other hand, it be true

that Hanley *did* actually know of the bid of the Chemung Mining Company and it be also true that he himself had also bid $700 for the same interest, the statements made and assented to by Hanley and the administrator before the probate judge in the presence of Woods when the matter of the confirmation of the sale came on for hearing on the 26th of July, 1897, cannot be explained consistently with good faith and fair dealing either on the part of Hanley or the administrator. The counsel for the appellant here concedes that Woods, who had been requested by Kerns to look after the confirmation of the sale to the Chemung Company in pursuance of its accepted bid, did not know of any bid of Hanley or any other party than the Chemung Company. Therefore, when told by the administrator in the presence of Hanley and the judge that the bid had been raised, and when in response to his question "By whom?" he was informed that it was by the "original bidder," he very naturally said such a proceeding was "queer." Being there in the interest of the Chemung Company, if either Hanley or the administrator had said that the $50 raise was by *Hanley*, Woods would have at least had the opportunity of seeing that the sale made to the Chemung Company pursuant to its bid and reported by the administrator for confirmation was not, as in fact it purported to be, confirmed to *Hanley* for the similar sum of $700. This manifest deception of the representative of the Chemung Company, coupled with the facts that the administrator had theretofore accepted the bid of that company and so reported to the court, expressly stating at the same time that there was no other bid, and no other bid being, in fact, produced, supplemented by the extraordinary payment by Hanley to the administrator of the $750 the night before the day set for the hearing of the administrator's petition for the confirmation of his previously reported sale to the Chemung Company for $700, and the withholding of notice of such payment from the court as well as that company when the accepted bid of the company came up for consideration, discloses such deceit and fraudulent practices as preclude any and every person in any manner engaged in them from the aid of any court of equity.

But all of the fraud in the case was by no means committed by the complainant. The one-eighth interest in the Skookum mine here involved was confessedly the property of Hanley. So *was* 100,000 shares of the stock of the Chemung Mining Company. In respect to that interest the court below held that Hanley dealt with the defendants Clark and Sweeny at arm's length. There is not the slightest doubt that the letters from Hanley to O'Neil, introduced in evidence and written a few weeks before the making of the contract of April 30, 1898, shows that there was an absolute want of confidence on his part in either Clark or Sweeny, so that the court below was quite right in saying that any pretense that in the agreement to dispose of his one-eighth interest Hanley relied upon any *representations* of Clark and Sweeny, or either of them, was without any valid support. But that is no answer to the proposition that

they fraudulently *withheld* from their co-owner the facts in respect to the discovery of ore in the Skookum mine made in pursuance of work prosecuted by the company, in which he was a stockholder, and at his expense, of course, as well as theirs. That they did so withhold and conceal such facts is abundantly shown by the record, and, indeed, affirmatively appears from their own testimony.

The Skookum mine was reached underground only through a tunnel that had its commencement in the ground of the Last Chance mining claim, of which the defendants Clark and Sweeny were the principal owners and of which one Presley was superintendent. The underground work done in the Skookum mine was done also under the superintendency of Presley, and engaged under him was, among others, a shift boss named Kendall. Presley's testimony is to the effect that in running the diamond drill into the Skookum ground, under the direction of Clark and Sweeny he discovered, about April 24th or 25th, 1898, a body of ore in the Skookum, into which by the 30th day of that month a drift had been driven about 35 or 40 feet, disclosing a body of ore of such dimensions and value as that Presley, when asked to give his estimate of the value of the Skookum mine, in its condition on the 30th of April, 1898, when the contract between Hanley and Clark and Sweeny was made, answered: "Judging from the prices you would have to pay for mines similar to that, it would be in the neighborhood of two hundred and fifty or three hundred thousand dollars. I don't know that you could get one for that price that was similar." Presley further testified that Clark and Sweeny were fully apprised of the ore discovery, but that Hanley was not, and what is more, that Hanley was kept in ignorance of it by the express orders of Clark and Sweeny. We extract from his testimony.

By COMPLAINANT'S COUNSEL:

Q. "I will ask you if during the month of March or April, 1898, any application was made to you by Mr. Hanley to go into that mine and examine it?

A. Yes, sir; Mr. Hanley asked me if he could go through the mine.

Q. Did he state any reason why he wanted to go into the mine?

A. He said he had interests in the mine and that he was entitled to go through. I told him I was instructed by Mr. Sweeny not to allow him to go into the mine.

Q. State whether or not, acting under those directions, you prevented him from going.

A. Yes, sir; I prevented him.

Q. What did you say to him?

A. I merely told him that he could not go in the mine, that I was prohibited from allowing him to go into the mine.

Q. Do you recollect whether he asked you more than once the privilege of going in?

A. Yes, he did. I believe he asked just before he gave an option on his interest to Sweeny.

Q. How long before?

A. Well, I think it was the day before, if I remember right, or a day or two. I don't just remember; I know it was shortly before.

Q. And you prohibited him from going in under the direction of Mr. Sweeny?

A. Yes, sir.

Q. Did you tell Mr. Hanley about what the true condition of the mine was at that time, or did you give him any information about it?

A. I told him there was nothing in there to speak of.

Q. I will ask you now if Mr. Sweeny instructed you, or Mr. Clark, not to disclose the condition of the mine to either Mr. Hanley or anybody else?

A. Yes, sir, I was instructed so by Mr. Sweeny.

Q. And you did not?

A. No, sir, I did not.

Q. Did you know anything about the negotiations between Hanley and Sweeny and Clark about the sale of his interest in the Skookum mine?

A. Yes, I did.

Q. Did you know anything about those negotiations either from Mr. Sweeny or Mr. Clark, or both of them?

A. I did not know personally through them, but I knew that they were making a deal.

Q. That was before the deal was made, as you understood?

A. Yes, sir. I knew it at the time.

Q. You knew it was in contemplation?

A. Yes, sir.

Q. Did you have any conversation with them or either of them about their having made a deal with him, after it was done?

A. Nothing only what Mr. Sweeny told me.

Q. Mr. Sweeny told you?

A. Yes, sir.

Q. About what time was it that he told you?

A. Well, If I remember rightly, it was about the first of May of 1898.

Q. What did he say about his negotiations with Hanley about the deal?

A. He came up from Spokane one afternoon and in the evening about seven or eight o'clock he told me that he had secured an option on Kennedy Hanley's interest in the Chemung for $20,000 and his interest in the Skookum for $10,000.

Q. Did you know what Mr. Hanley's interest was in the Chemung, what it consisted of?

A. I understood it to be a third and an eighth.

Q. No, I mean in the Chemung, not in the Skookum?

A. Oh, in the Chemung. I understand he had some stock and

some interest besides in the first, but I don't know what it terminated in afterwards.

Q. What interest did Mr. Sweeny say he had got in the Chemung?

A. Why, he didn't state in particular what interest it was. He said he had his interest in the Chemung for $20,000, all his interest. That is all I heard him say.

Q. And what did he say about the Skookum?

A. He said an option on his interest in the Skookum for $10,000."

Presley further testified that Kendall was the shift boss in charge of the work that penetrated the ore body referred to and that about the latter part of May, 1898, he (Presley) discharged him. When asked why, Presley answered: "Why, he came to me a short time before—I don't remember the time—but he asked me questions in regard to the Skookum ground and if Kennedy Hanley did not own interests in there. I did not make him any answer; I simply laid him off the first opportunity I got.

Q. What was the reason? Why did you lay him off?

A. Well, my instructions were to not allow anyone to know any more about it than possible. That was one of the reasons.

Q. Was it not, Mr. Presley, for the purpose of protecting the interests of your employers Sweeny and Clark?

A. Yes, that was my idea of it, and that is what I tried to do right along.

Q. Did you ever admit any other person into that mine along about that time?

A. Why, I never admitted anyone at my own responsibility, unless they were with Mr. Sweeny. Mr. Sweeny brought some men there with him, some that come from the East.

Q. When did he bring men there?

A. Along the first of May."

Kendall's testimony is to the effect that shortly before his discharge and about the time the ore was struck in the Skookum mine he told Presley that he had met Hanley on the street the evening before and that Hanley had asked him, "Concerning this drift, how far we were in and if we had any ore, and I said I gave him no set answer. He kind of smiled and says, 'Well, maybe he has an interest in it,' and walked off." The witness further said that he didn't think that he told Presley exactly what he had replied to Hanley, and in answer to the question, "But you did not tell Hanley anything," answered, "No, not exactly. I told him there was some ore. I did not give him any decided answer." And Kendall was discharged for the reason already stated.

Clark himself says in his evidence that when asked by Hanley concerning the mine, he said that they "had some encouragement," but he expressly states that he omitted "details." He further admitted in his testimony that the "fairness" of contracting for Hanley's interest without telling him what he knew "was not considered" by him. Yet, within a few days of the discovery of the large and valuable ore body in the mine Clark telephoned to Hanley request-

ing him to come to Spokane and on his arrival met him at his hotel and began negotiations which culminated in the contract of April 30th, 1898. A grosser fraud upon a co-owner of the property it is difficult to conceive.

Now, what was the contract of April 30th, 1898? At that time the mandamus proceedings against the administrator of the McKelvey estate to compel him to execute a deed for the one-third interest of that estate in the Skookum mine to the Chemung Mining Company, in pursuance of the order of the probate judge made August 13th, 1897, were still pending in the supreme court of the State of Idaho, and that interest was then still being claimed by Hanley under the deed executed to him by the administrator, and by Clark and Sweeny as the property of the Chemung Mining Company. The proposition made by Hanley to Clark and Sweeny on that day, under and pursuant to the negotiations initiated at their request, was in writing and is in evidence. It is as follows:

"My proposition is this:

I will sell my one hundred thousand (100,000) shares in the 'Chemung Company' (at 20 cents a share) for twenty thousand dollars ($20,000.00). I will sell my ⅓ and ⅛ interest in the 'Skookum' claim at the rate of thirty thousand dollars for the whole claim.

Spokane, April 30th, 1898.

K. J. HANLEY."

Hanley's testimony is to the effect that throughout the negotiations leading up to the contract he refused to sell the one-eighth interest in the Skookum mine, which he confessedly owned, without including also the McKelvey one-third interest which was in dispute between the parties and the defendant Clark himself seems to admit as much, although his testimony is to the effect that Hanley finally agreed otherwise. On his cross-examination Clark was asked: "Q. Did Mr. Hanley at any time ever offer to sell you either the one-eighth or the one-third in the 'Skookum' mine separately from the other interest, separately from each other? A. He did not offer to sell them separately from each other. Well, that is to say—no, he never at any one time said—he never at any one time entered into negotiations about the one-eighth without having a negotiation at the same time about the one-third. Q. The negotiations always covered both of his claimed interests, you denying that he had any interest in the one-third and he claiming that he had, and you admitting that he owned a one-eighth interest? A. I think I asked Hanley at one time to put a price on every thing he owned and everything he claimed up there, and he, in general, answered that he wanted to put a price on the whole of it; but when he came down to actually agreeing upon something, we agreed as I have said."

The written proposition of Hanley, by which he offered to sell the one-third and one-eighth interests at the rate of $30,000 for the whole claim, would, as will readily be seen, make those interests amount to something over $12,000, and Hanley admits that in the

subsequent discussion of his written proposition he receded from that to the extent of finally agreeing to take for those two interests $10,000 and $20,000 for his 100,000 shares in the Chemung Company. The testimony of Clark and Sweeny, on the other hand, is to the effect that the final agreement was $20,000 for the Chemung stock and the one-eighth interest in the Skookum mine, and $10,000 for the McKelvey one-third interest. It is not disputed that the papers in respect to the transaction were to be, and, in fact, were, placed in escrow. The papers were prepared in the office of Clark and Sweeny on Saturday morning, April 30th, 1898, in some haste, in order that they might be deposited in a bank before the closing hour of 12 o'clock of that day. Separate deeds were prepared for the two interests in the Skookum mine, and each were signed by Hanley in Clark and Sweeny's office. All three of them at the same time signed an endorsement upon each of two envelopes prepared by a clerk of Clark and Sweeny and under the latter's dictation, one of which reads as follows:

"This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions:

"If Chas. Sweeny and F. Lewis Clark shall pay into said bank for the credit of Kennedy J. Hanley eighteen thousand dollars ($18,000.00) on or before July 1st, 1898, then this envelope with its contents shall be delivered to said Sweeny and Clark; otherwise, it shall be delivered to Kennedy J. Hanley.

"Dated at Spokane, Wash., this 30th day of April, A. D. 1898."

And the other:

"This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions:

"If Chas. Sweeny and F. Lewis Clark shall pay into the said bank for the credit of Kennedy J. Hanley ten thousand ($10,000.00) dollars on or before August 1, 1898, then this envelope with its contents shall be delivered to said Sweeny and Clark; otherwise, it shall be delivered to Kennedy J. Hanley.

"Dated at Spokane, Wash., this 30th day of April, A. D. 1898."

There is no dispute in the evidence in respect to the fact that under the terms of the agreement of sale, whatever they were, Hanley was to be, and in fact was, paid $2,000 in cash in consideration of the options and Hanley's testimony is to the effect that after the signing of the deeds and the endorsements upon the two envelopes, he placed in the envelope requiring the further payment of $18,000 the certificate for the 100,000 shares of the stock in the Chemung Mining Company and in the other envelope the two deeds for his interest in the Skookum mine, and that the three parties then left the office and went to the bank, taking the papers along. At the bank was a notary public, before whom Hanley acknowledged the execution of the deeds and received from Clark and Sweeny a check for $2,000. It is contended

on behalf of Hanley that, while he went to the desk of one of the bank clerks to make some arrangement in respect to the check and after the notary had returned the deeds with his certificate of acknowledgment thereon, Sweeny fraudulently put the deed for Hanley's undisputed one-eighth interest in the Skookum mine in the envelope with the certificate of stock in the Chemung Mining Company, containing the endorsement requiring the additional payment of $18,000, and in the other envelope placed the deed covering the McKelvey one-third interest in the Skookum mine, and in that condition the envelopes were sealed and left with Dyer in escrow. The testimony of Clark and Sweeny is to the effect that the papers were so placed, not only with the knowledge of Hanley, but that it was the distinct understanding and agreement that they should be so placed—the contract, according to their testimony, being that the $20,000 sale and purchase, if consummated, should embrace both the Chemung stock and the one-eighth interest in the Skookum mine and that the $10,000 sale and purchase, if consummated, should embrace only the McKelvey one-third interest in the mine. There is no doubt that some support is added to this contention by the fact that separate deeds were executed for the one-third and one-eighth interest, while one might have been made to embrace both, and by the further fact that in one of the endorsements the time fixed for the exercise of the option was July 1, 1898, and in the other—that in fact covering the deed for the McKelvey one-third interest—was August 1, 1898, which latter date Clark and Sweeny testify was so fixed in order to give more time for the decision by the supreme court of Idaho of the mandamus case. But it must be remembered that all of the papers were prepared by Clark and Sweeny and that it was at their suggestion that separate deeds were executed, and while the fixing of August 1, 1898, as the date for the taking up of the deed for the McKelvey interest was very likely for the purpose of allowing more time for the decision of the mandamus case, that fact makes but little against Hanley's contention that the envelope bearing that endorsement was also to contain the deed covering the one-eighth interest. There can be no doubt that Hanley's proposition was to sell his stock in the Chemung Company for $20,000 and both of the interests claimed by him in the Skookum mine together for something over $12,000. There can be no doubt of that fact, for the proposition was in writing and is in evidence. We think it quite certain also, that throughout the negotiations preceding the final agreement Hanley insisted that the two interests, one of which he confessedly owned and the other claimed by him, should go together, and that he would not sell to the defendants Clark and Sweeny one without selling both; for such is not only Hanley's testimony, but is practically admitted by Clark. From his written offer it appears that Hanley valued his stock in the Chemung Company at $20,000 and both interests in the mine together at but little over $12,000, and in the discussion that resulted in Hanley's reducing his price for those two interests to $10,000 it does not appear

that Clark or Sweeny objected to his demand of $20,000 for the Chemung stock. Under such circumstances it does not appear to us reasonable or at all probable that Hanley would, as Clark and Sweeny contend he did, have finally agreed to sell the one-eighth interest in the mine, which he admittedly owned, in addition to the 100,000 shares of the stock of the Chemung Company, for $20,000. In that view, also $10,000 would certainly appear to be an extraordinary and extravagant price for Hanley to demand and Clark and Sweeny to agree conditionally to give for the disputed one-third interest in the same mine. It appears further that on the sixth or seventh day of June, 1898, Clark and Sweeny applied to Hanley for an extension of the time within which to take up the escrows. They wanted until October 1, 1898, and agreed to pay Hanley $2,000 therefor, to be applied to the purchase price. Hanley objected to making the extension run to October 1st and September 20th, 1898, was finally agreed upon. Clark testified that they only wanted the extension to apply to the Chemung stock and the one-eighth interest in the mine, as the supreme court of Idaho a short time before had affirmed the decision of the trial court in the mandamus case, but that Hanley insisted that it should also apply to the one-third interest therein, as he wanted "to keep on making this fight." The record shows that there was at that time a petition pending in the supreme court of Idaho for a rehearing of the mandamus case, which, however, was finally disposed of within a few days thereafter by a denial of it. This statement of Clark as to their wishes in regard to the extension sought cannot be reconciled with the statement of Hanley, which is not denied, that Sweeny applied for a further extension of time within which to take the one-third interest in September, 1898. As a matter of fact, the extension was granted in the case of each of the escrows—that on the envelope calling for the additional payment of $18,000 in these words:

"I hereby extend the above escrow to Sept. 20th, 1898.
"Spokane, W., June 6th, '98.
KENNEDY J. HANLEY."

And that on the envelope calling for the payment of $10,000:

"I hereby extend the above escrow to Sept. 20th, 1898.
"Spokane, W., June 7th, '98.
KENNEDY J. HANLEY."

The $2,000 payment in consideration of the extension was evidenced by writing as follows:

"SPOKANE, June 7, 1898.

E. J. Dyer, csh:

This is to certify that Clark and Sweeny have paid $2,000, on the $18,000.00 escrow agreement due Sept 20, 1898; so that only $16,000.00 is due on same.

KENNEDY J. HANLEY."

Clark testified that as soon as the papers were left in escrow at the bank on April 30th, 1898, he went back to his office, where Goodspeed, his clerk said to him: "Give me a description exactly what those envelopes contained, so that I can keep track of them," and that he replied, "That the $18,000 envelope, the one that we were required to pay on July 1st, contained an eighth interest in the Skookum and 100,000 shares of Chemung stock," and that the other contained "one-third interest to the Skookum property, which was payable on August 1st," and that Goodspeed "at once sat down and prepared a copy of the two escrow agreements and added to each copy the distinguishing statement that I made to him," which were afterward put in their letter press book. Clark further testified that at the time he and Hanley were talking about the June extension he called for the letter press book and read to Hanley therefrom a "description of the escrows and the memorandum which described what the envelopes contained, which," added the witness, "was necessary for me to know and for Mr. Hanley to know in order to know what we were paying on when we went down to the bank." This statement of Clark is denied by Hanley, who said that the letter press book was not shown to him in June at all, but was shown to him by Sweeny on the 17th of September; whereupon he disputed it and went at once to the bank and told Dyer, "I am dealing with two rascals and I want you to watch the escrows." Although Dyer was a witness on behalf of the defendants, he was not asked anything in respect to this testimony of Hanley. While the endorsements on the envelopes did not mention their contents, the amounts specified to be paid as a condition to their delivery plainly showed the one that covered the Chemung stock and also—if Clark and Sweeny's version of the agreement be true—the deed for the one-eighth interest in the mine. There was, therefore, no such necessity as that testified to by Clark of resorting to the memorandum that he had caused to be entered in the letter-press book of Clark and Sweeny, nor any occasion whatever to resort to anything but the endorsements on the envelopes, to know which covered the Chemung stock; for the balance required to take up the contents of that envelope was there expressly declared to be $18,000. If the agreement really was, as is contended on the part of the defendants, that that envelope should, as in fact it did, also contain the deed for the one-eighth of the Skookum mine, there would not have been the slightest occasion for Clark or Sweeny to have called Hanley's attention to any memorandum that they made in their office in respect to the matter. The fact of the making of the memorandum, and, especially Clark's testimony in respect to it we cannot but regard as suspicious. Looking at all of the facts and circumstances of the case and carefully weighing them, we are satisfied that the truth is that the one-eighth interest in the mine was not by the agreement of the parties coupled with the Chemung stock; that the deed therefor was improperly placed in the envelope containing

the stock, and that Clark and Sweeny received it without consideration and in fraud of Hanley's rights.

The judgment is reversed and cause remanded to the court below for further proceedings not inconsistent with this opinion.

(Endorsed:) No. 615. United States circuit court of appeals for the ninth circuit. Kennedy J. Hanley *vs.* Charles Sweeny *et al.* Opinion. Filed May 6, 1901. F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

KENNEDY J. HANLEY, Appellant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE State-Idaho Mining and Developing Company, Appellees. } No. 615.

Decree.

Appeal from the Circuit Court of the United States for the District of Idaho, Northern Division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, northern division, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs and the cause remanded to said circuit court for further proceedings not inconsistent with the opinion of this court.

(Endorsed:) Decree. Filed and entered May 6, 1901. F. D. Monckton, clerk.

* * * * * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

KENNEDY J. HANLEY, Petitioner,
vs.
JAMES H. BEATTY, United States Judge for the District of Idaho, Respondent. } No. 820.

Opinion U. S. C. C. A.

Petition for Writ of Mandamus.

John R. McBride and M. A. Folsom, counsel for petitioner.
W. B. Heyburn and E. M. Heyburn, counsel for respondent.

Before Gilbert, Ross, and Morrow, Circuit Judges.

MORROW, circuit judge, delivered the opinion of the court:

The case of Kennedy J. Hanley, complainant, *vs.* Charles Sweeny, F. Lewis Clark, and The Empire State-Idaho Mining and Develop-

ing Company, a corporation, defendants, was a suit in equity, brought in the circuit court of the United States for the district of Idaho, northern division, on the 18th day of March, 1899. The suit involved complainant's claim to the ownership of eleven twenty-fourths of certain mining ground described as the Skookum mining claim, located in the Yreka mining district in the county of Shoshone, in the State of Idaho. The complainant's right to eight twenty-fourths or an undivided one-third interest in the Skookum mining claim was based upon certain proceedings which complainant claimed amounted to a purchase of that interest from one Cunningham, the administrator of an estate, who sold the interest in settling up the estate in the course of probate proceedings in the State court of Idaho, but the administrator had conveyed this interest to a mining company, which also claimed to be a purchaser from the administrator, and had received a deed of conveyance of this interest in the course of such probate proceedings and had conveyed the same to the defendant The Empire State-Idaho Mining and Development Company. Complainant's title to the remaining three twenty-fourths or an undivided one-eighth interest in the Skookum mining claim, was derived through mesne conveyances from the original grantee by patent from the Government of the United States. This latter title had been conveyed by the complainant to the defendants Charles Sweeny and F. Lewis Clark by deed dated April 30, 1898, deposited on that day in the Exchange National Bank of Spokane, in the State of Washington, in escrow, to be delivered to the defendants Sweeny and Clark upon certain stipulated conditions. Complainant claimed that the defendants Sweeny and Clark had obtained possession of this deed wrongfully and contrary to the terms of the escrow agreement.

It appears from the bill of complaint that on the 30th day of April, 1898, the complainant was the owner of 100,000 shares of the capital stock of the Chemung Mining Company, a company whose mining claims were located in Yreka mining district in the State of Idaho; that prior to April 30, 1898, some negotiations had passed between complainant and Clark and Sweeny involving the sale to them of complainant's 100,000 shares of the capital stock of the Chemung Mining Company and his one-third and one-eighth interests in the Skookum mining claim; that complainant offered to sell to Clark and Sweeny his 100,000 shares in the Chemung Mining Company at twenty cents a share, or $20,000; that he also offered to sell his one-third and one-eighth interests in the Skookum mining claim at the rate of $30,000 for the whole claim; this would have amounted to $13,750 for his two interests in that claim.

The complainant claimed that in these negotiations he receded from the latter proposition, and agreed to take $10,000 for his one-third and one-eighth interests in the Skookum claim, but adhered to his proposition to sell his 100,000 shares in the Chemung Mining Company for $20,000. He claimed that both of these offers were accepted by Clark and Sweeny, and that at their request he made

two separate deeds for his one-third and one-eighth interests in the Skookum claim; that the 100,000 shares of the Chemung Mining Company stock were to be placed in one envelope under an escrow agreement of sale, and the two deeds for one-third and one-eighth interests in the Skookum claim in another envelope, also under an escrow agreement to sell, and both of these envelopes were to be deposited with the Exchange National Bank at Spokane, Washington, to be taken up at specified dates and upon the conditions therein named. He claimed that the final agreements under which the deeds for his two interests in the Skookum claim and the 100,000 shares of stock in the Chemung Mining Company were deposited in escrow were that he should sell and Clark and Sweeny would purchase his 100,000 shares of the Chemung mining stock for $20,000 and his one-third and one-eighth interests in Skookum claim for $10,000, making two separate and distinct transactions. He claimed that accordingly the 100,000 shares of stock were placed in escrow in one envelope to be delivered to Clark and Sweeny on the payment of $20,000, and the two deeds for his interests in the Skookum claim were placed in escrow in another envelope, to be delivered to Clark and Sweeny upon the payment of $10,000. Clark and Sweeny, on the other hand, claimed in their answer that the agreement was that Hanley was to sell his 100,000 shares in the Chemung Mining Company and his one-eighth interest in the Skookum claim for $20,000, and his one-third interest in the Skookum claim for $10,000; that two envelopes were accordingly prepared and the deeds and stock placed therein in escrow in accordance with the terms of the agreement as understood by Clark and Sweeny. The complainant claimed that this arrangement of these two agreements in escrow was without his knowledge and was a fraud upon him.

When the terms of this escrow expired, the complainant found that Clark and Sweeny had paid the $20,000 and taken up the escrow agreement for the 100,000 shares of stock in the Chemung Mining Co., and the deed for the one-eighth interest in the Skookum claim, and had left the deed for one-third interest in the Skookum claim in the other envelope, this latter deed not having been accepted by Clark and Sweeny because in the meantime litigation respecting this one-third interest had proceeded so far that Clark and Sweeny considered that complainant's claim to that interest was of no value.

It was alleged in the bill of complaint that the defendants Clark and Sweeny procured the agreement from complainant to sell his interests in the Skookum mine by covin and fraud, the particulars of which were set forth in the bill. It is alleged that the said Skookum mine had been reached for working purposes by certain workings known as "Last Chance," which were in the exclusive control of the defendants Clark and Sweeny; that they had declared at the time of the making of the agreement by which they took the option to purchase complainant's interests that the workings of

the "Last Chance" mine had penetrated to the said Skookum claim and that they knew the ground was of little value and contained no ore. It was alleged that they had stated that they desired to purchase complainant's interests in the Skookum claim, not because the claim was of any value for ore, but because it was surrounded by other claims which were of value, and would be useful to them for combining it for working purposes with the said other ground, and give breadth, bulk, and character to their plan to put the consolidated land on the market. It was alleged that the complainant had no means of personal knowledge as to the value of said ground except its situation with reference to other claims of which he had some knowledge; and, relying upon these representations made by the defendants Clark and Sweeny that they had not in their workings penetrating the said claim found any ore or ore body, and that they had no more information about the same than the complainant had, he fixed the price of his entire interest in said Skookum claim at $10,000. It was alleged that the actual facts were that the defendants' works penetrating said Skookum ground had disclosed an immense body of ore of great value, and that the said Clark and Sweeny had willfully falsified and misstated the facts to the complainant, that they might procure said contract with him and defraud him into making the agreement to sell the said interests, well knowing that he was ignorant of the truth. It was further alleged that the ores contained in the Skookum mine were of such value that there has been taken out from such body then disclosed ore to the value of not less than $150,000 net, over and above the cost of mining, treating, extracting, and marketing the same. It was alleged further that the defendants had given out and asserted that they owned the Skookum claim and that complainant had no interest therein; that they had many millions of dollars' worth of ore in sight, and intended to take the same to their own use. The complainant alleged further that the said property was of no value except for the ores contained therein, and that the defendants were rapidly exhausting the same to the utter destruction of complainant's rights.

The bill further alleged that the defendants Clark and Sweeny organized the corporation defendant under the laws of the State of New York, and since the 15th day of May, 1898, the said corporation defendant has been engaged in working the ores contained in the said Skookum claim, under the general supervision and direction of the said defendants, who were alleged to be the officers of the said corporation and the owners of the majority of the capital stock thereof.

The relief prayed for in the bill was that the conveyance by the complainant to the defendants Clark and Sweeny be set aside and declared null and void from its date; that the defendants be held to account for the complainant's share of the proceeds of the said Skookum mine taken therefrom by the defendants after the time the escrow deeds were made and prior to the filing of the bill of

camplaint; that the defendants should be required to set forth the nature of their claim to said premises, and that all adverse claims thereto should be determined by decree of court; that by the decree it should be declared and adjudged that the defendants and each of them had no estate or interest whatever in or to complainant's interest in said Skookum claim, and that the title of the complainant was good and valid thereto and therein; that the court should appoint its receiver to take into his possession and control the said Skookum mine and workings, and continue the operation of said mine under such rules and directions as the court might decree necessary for the preservation of the rights of the complainant and those of the defendants; that the defendants and each of them should be enjoined and prohibited by the court, and all and each of their agents, servants, and employees, from in anywise working and extracting any ore therefrom pending the trial on the merits and until the final determination of the rights of the parties therein.

The defendants in their answer denied that the complainant had at the time of the commencement of the action any title or interest, claim or right in or to the said Skookum mining claim, or any part thereof; they denied that the complainant became the purchaser of a one-third interest in the Skookum mining claim as alleged in the bill of complaint, but asserted that such interest was purchased by the Chemung Mining Company. They also denied the fraud charged in the transactions relating to the deposit of complainant's deeds and stock in escrow as alleged in the bill of complaint. They alleged that by virtue of good and sufficient mesne conveyances the defendant The Empire State-Idaho Mining and Developing Company was then the owner of the said Skookum mining claim, and every part thereof. They denied that the ores contained in the Skookum mine were of such value that there had been taken out of the ore bodies then disclosed in said mining ground up to the time of the commencement of the suit ore of the value of not less than $150,000, over and above the cost of mining, treating, extracting, and marketing the same, or in which the complainant was entitled to any share or interest thereof, but alleged the fact to be that there had not been taken from any of the ore bodies that were disclosed in the said ground at the time of the placing of said deeds in escrow and the making of the contract therefor, any ore of any value, and that no ore bodies of known value had been disclosed in said ground at the time of making said contract and the placing of said deeds in escrow. They admitted that they gave out and asserted that the complainant had no interest therein, and alleged that said assertion was true. As officers and agents of said corporation defendant, the defendants Clark and Sweeny admitted that they intended on behalf of said corporation to extract the ores from said Skookum mine and property, and appropriate the same to the use of said corporation, the owner of said claim.

The complainant having filed his replication to the answer of the defendants, the parties proceeded to take testimony upon the issues

presented by the bill and answer, and upon a hearing the circuit court rendered its opinion on December 30, 1899, in which it was ordered that the prayer of the complainant be denied, and that defendants be dismissed with their reasonable costs. The complainant thereupon brought the case to this court upon appeal. After a review of all the facts in the case, this court determined that the complainant was not entitled to any relief with respect to the claim that he was a purchaser of a one-third interest in the Skookum mine in the probate proceedings in the State court, but with respect to the one-eighth interest in that mine this court held that the deed conveying that interest to the defendants Clark and Sweeny was not by the terms of the agreement of the parties coupled with the Chemung mining stock; that it was improperly placed in escrow in the envelope containing that stock, and that the defendants had received it without consideration and in fraud of complainant's rights. The judgment of the circuit court was therefore reversed and the case remanded to the court below for further proceedings not inconsistent with the opinion of the appellate court. (Hanley *vs.* Sweeny, 109 Fed. 712.) A petition for a rehearing having been filed in this court by the defendants and having been denied, the mandate of this court was issued to the circuit court on the 21st day of November, 1901, reciting the order of the court reversing the decree of the circuit court, and commanding "that such further proceedings be had in said cause, not inconsistent with the opinion and decree of this court and as according to right and justice and the laws of the United States ought to be had, the said decree of said court notwithstanding." The mandate further contained the costs of the appellant, amounting to $947.50 in accordance with paragraph 5 of rule 31 of this court.

It appears from the petition for a writ of mandamus filed by Hanley, the complainant in the court below, that the mandate of this court was presented to the circuit court on November 26, 1901, and filed therein and entered of record. That on November 29, 1901, an order was made in the circuit court for the district of Idaho, directing the defendants to appear on December 23, 1901, and show cause why the court should not proceed in accordance with the mandate of this court to grant an injunction and receiver, to refer the cause to a master for an accounting, and to grant other relief. It is alleged that the defendants appeared on that day in obedience to said order and made the showing, and after the hearing the petitioner by leave of the court withdrew his motion for an injunction and receiver without prejudice to a renewal of said motion should the Supreme Court of the United States deny the petition of the defendants then pending for a writ of certiorari from the Supreme Court to review the decree of this court; and said circuit court then and there ordered the cause to proceed, and referred the same to the master in chancery to take an accounting of the ores extracted from the said Skookum mine and mining claim. It is alleged that

on January 13, 1902, the Supreme Court denied the defendants' application for a writ of certiorari.

It is further alleged in the petition that on February 8, 1902, the petitioner, after giving due notice to the defendants, applied to the Hon. James H. Beatty, United States district judge of Idaho, acting as judge of the United States circuit court for Idaho, for an injunction to restrain the defendants from extracting ore from said Skookum mine to the exclusion of the petitioner, and for a receiver for said mine, and for an order permitting the petitioner to enter said property to the ore bodies therein, and for an execution to collect the cost of appeal. It is further alleged that the application for an injunction, receiver, and for order to enter, and for execution, was denied by said judge on February 11, 1902.

It is alleged that on February 24, 1902, a time and place of hearing having been theretofore fixed, and notice thereof having been regularly given as directed by the order of reference, the parties appeared before said master in chancery for the purpose of taking an account of the ores extracted; that the petitioner filed with said master a statement of claim and charge in the form of a debit and credit account, showing that petitioner's share of the ore extracted by defendants from said Skookum mine amounted to $315,000; that the defendant corporation filed an answer with said master in which it stated that it had extracted no ores from said Skookum mine subsequent to April 30, 1898, and therefore it could file no debtor and creditor statement. Thereupon said defendant filed a petition that it be given until March 15, 1902, in which to file its account of ores extracted from underneath the surface of the Skookum claim. It is alleged that this petition was granted by the master.

It is further alleged that testimony was then offered by the petitioner and received by the master in support of the petitioner's statement of claim; that *no* March 15, 1902, the Hon. James H. Beatty, acting as judge of the circuit court, by order made at Boise, Idaho, suspended the previous order for accounting made December 23, 1901, and refused to proceed with said accounting or to permit the master to do so. It is alleged in said petition that the order of said circuit court made by the said Hon. James H. Beatty, judge, suspending said accounting, and the order denying the motion for an injunction and receiver, and the order denying a writ of execution for the costs of appeal, and the act of refusing to proceed with the cause are, and each of said orders is, and such refusal is, contrary to law, oppressive to the petitioner, inconsistent with the decree of this court, irregular and unauthorized, and in disobedience of the command of the mandate of this court; that the petitioner has no way of protecting his property unless this court interfers, that the ores contained in said mine are being rapidly exhausted, and the petitioner is informed and believes that the property will be entirely destroyed and exhausted within five or six months unless protected by order of court; that defend-

ants are all nonresidents of the State and district of Idaho, and the petitioner has no method of enforcing his rights against defendants, and has no way of perfecting the said cause for final decree until said accounting shall have been completed, save by his present application and petition.

Upon this statement the petitioner prays for a writ of mandamus to be issued from this court, commanding and requiring the Hon. James H. Beatty, sitting as judge of the United States circuit court for the district of Idaho, without delay to execute the mandate of this court in this cause in accordance with the opinion of this court, and to set aside the order made by him on the 15th day of March, 1902, staying said accounting, and to grant a proper writ for the enforcement of the degree of this court for costs, and to grant an injunction restraining the defendants from working and extracting ores from said Skookum mine and mining claim, and to order that the petitioner be let into possession of said property, or, on failure thereof, to show to this court, on the return day of the said writ, why the same has not been done; and for costs of this proceeding.

In answer to this petition Judge Beatty has made a return or answer, in which he suggests, among other things, that the orders complained of in the petition are in character judicial, involving the the exercise of discretion and judgment, and not merely ministerial; that if he is in error in this position, the writ of mandamus is not the proper remedy; that the cause was heard in the northern division of the district of Idaho, and since the mandate of this court was sent down no term of the circuit court has been held in this division, and no judgment or action of any kind has been entered or taken in said circuit court in pursuance of said mandate. In addition to these technical objections to the present proceedings in this court, it is represented that one of the defendants in the original suit, the Empire State-Idaho Mining and Developing Company, has commenced an action against Hanley, the complainant in the former suit, alleging among other things that in the former action only the surface rights of the Skookum mining claim were involved or determined, and that the apex of the ledge which covered or included in its descent the ore bodies under the surface of the Skookum claim, was not put in issue or in any way litigated in the former action. It is further alleged that in the new action such apex of the ledge or vein found in the Skookum claim was in the San Carlos mining claim, and that therefore such ore bodies in the Skookum claim do not belong to either the Skookum claim or to the said Hanley, but do belong to said San Carlos claim and its owner, the plaintiff in the new action; and that plaintiff asks in this new action that the former order for an accounting be set aside until the determination of this new issue between the parties. A copy of the bill of complaint in the new action is attached to and made a part of the return or answer of Judge Beatty.

It is contended on behalf of the respondent that, so far as the original action relating to the one-eighth interest in the Skookum

mine claimed by the complainant Hanley is concerned, it was merely an action to cancel the deed, and possessed none of the elements of a suit to quiet title; that this court held that said deed was wrongfully obtained and should be canceled, and that the mandate was in accordance with this opinion.

The suit was in equity. Its purpose was to determine a controversy concerning an interest in a mining claim containing valuable ore and for an accounting for the value of the ore that had been taken out of the mine by the defendants, and for an injunction prohibiting the defendants, their agents, servants and employees, from in anywise working and extracting ore from said mine pending the trial of the case upon the merits and until the final determination of the rights of the parties thereto. The jurisdiction of the United States circuit court was invoked upon allegations of diverse citizenship in the parties to the action, and that the matter in dispute exceeded, exclusive of interests and costs, the sum or value of $2,000. That the amount in dispute did exceed $2,000, was shown by allegations that the premises in controversy were of the value of more than $10,000; that the ores contained in the said Skookum mine were of such value that there had been taken out of said ore body then disclosed in said ground up to the time of the commencement of the action ore of the value of not less than $150,000 net, over and above the cost of mining, treating, extracting and marketing the same, of which complainant was entitled to a share represented by his interest; and that the defendants gave out and asserted that they had millions of dollars' worth of ore in sight in said Skookum claim.

To show that the controversy was with respect to complainant's interest in the mine and the ore it contained, he further alleged that said described property was of no value except for the ore it contained. Defendants in their answer admitted that they had given out and asserted that the complainant had no interest in said claim, and they alleged that said assertion was true. The defendants Clark and Sweeny also admitted that they intended on behalf of the corporation defendant to extract the ores from the said mine and appropriate the same to the use of said corporation, the owner of the claim, but they did not deny that the claim had no value except for the ore it contained. These allegations in the complaint as to the value of the ore and the lack of value in the mining claim, aside from the ore, stood admitted, and became one of the established facts of the case for the purpose of jurisdiction as well as upon the merits of the case.

The allegation that the mine had no value except for the ore it contained, did not bring the case within the jurisdiction of the court, if the only dispute was as to an interest in the surface location; and if by reason of the allegations of the bill concerning the value of the ore in the mine the fact that the dispute related only to the surface location was overlooked, it was the duty of the court to dismiss the

bill for want of jurisdiction when that fact was discovered. Sec. 5 act March 3, 1875; 18 Stats. 470.

The case was heard and determined in the circuit court, not upon any question of the sufficiency of the pleadings, but upon the merits of the whole case, the decree of the court reciting that the court had found that the allegations of the bill had not been sustained by the evidence. Upon appeal this court also determined the controversy upon the merits of the whole case, and found that the evidence did sustain the allegations of the bill as to the one-eighth interest claimed by the complainant, and directed the court below to proceed and grant that relief which the complainant was entitled to have according to right and justice and the laws of the United States.

Section 4538 of the Revised Statutes of Idaho provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." Under the statute the circuit court had jurisdiction upon the pleadings to determine the entire controversy between the parties respecting the Skookum mine and the ores therein contained. Holland *vs.* Challen, 110 U. S. 15; Reynolds *vs.* Crawfordsville Bank, 112 U. S. 405. It was the duty of the defendants to interpose all the defenses they had to the action, and, having failed to do so, the defendant The Empire State-Idaho Mining and Developing Company is debarred from interposing a defense which they had at that time by a new action. Benton *vs.* Hume, 37 Fed. 738.

In Dowell *vs.* Applegate, 152 U. S. 327, 345, the rule in such a case is stated to be: "A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to any ground which might have been presented."

Testimony on behalf of the defendants is referred to as tending to show that the apex of the vein containing the ore in the Skookum mine was outside the surface location of that claim, and it is contended that because counsel for the complainant objected to this testimony as irrelevant and immaterial, he must be deemed as having objected because that issue was not involved in the case. No such inference can be drawn from the proceedings. It was not claimed that this testimony tended to show that the apex of the vein was outside the Skookum claim and in some other claim owned by the defendants; and unless that was the purpose of the testimony, and it tended to establish that fact, it was clearly irrelevant and immaterial. The defendants were required to prove whatever adverse title they had, and unless the testimony tended to establish such a title, it was subject to complainant's objection. The testimony is, however, in the record, and it is not claimed now that, as it appears in the record, it tends in any way to establish such a defense. Moreover, no ruling of the court below excluding such testimony was brought here on the appeal, and if any inference is to be drawn from this feature of the proceedings, it is that the defendants did not con-

sider the question as to the apex of the Skookum vein as being an issue in the case.

We are of the opinion that the petitioner is entitled to have the mandate of this court in Hanley *vs.* Sweeny, *et al.*, enforced; but, in view of the statement of the respondent that he will proceed to enforce it upon being advised as to the views of this court upon the questions that have been discussed in this opinion, we will withhold the writ of mandamus until the further order of the court.

(Endorsed:) No. 820. In the United States circuit court of appeals for the ninth circuit. Kennedy J. Hanley, petitioner, *vs.* James H. Beatty, U. S. district judge, etc. Opinion. Filed May 12, 1902. F. D. Monckton, clerk.

* * * * * * *

In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE STATE-Idaho Mining and Developing Company, Defendants.

Final Decree.

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof and in pursuance of the mandate of the United States circuit court of appeals, in this cause, it was ordered, adjudged and decreed as follows:

I.

That the conveyance made by Kennedy J. Hanley to Charles Sweeny and F. Lewis Clark, on April 30, 1898, of a one-eighth interest in the Skookum patented mine and mining claim, and the ore therein contained, which said mine is situated in Yreka mining district, Shoshone county, Idaho, is hereby canceled, set aside, and declared to be null and void from its date.

II.

That the defendants, Charles Sweeny, F. Lewis Clark, and The Empire State-Idaho Mining and Developing Company, have, and each of them has, no interest or estate whatever in or to an undivided one-eighth interest in and to the said Skookum mine and mining claim and the ores therein contained. That the complainant, Kennedy J. Hanley, since April 30, 1898, has been and now is the owner of an undivided one-eighth interest in and to said Skookum mine and mining claim and the ores therein contained, and said interest is hereby quieted in him.

III.

That complainant, Kennedy J. Hanley, have and recover from defendant, Empire State-Idaho Mining and Developing Company, the sum of one hundred seventy-five thousand eight hundred sixty-seven and two-hundredths dollars ($175,867.02), comprising the following items:

1. Thirty-eight thousand five hundred seventy-seven and forty-one hundredths dollars ($38,577.41), being one-eighth of the proceeds (less freight and treatment and rebate) of said ores taken from the Skookum by defendants between May 15th, 1898, and March 18th, 1899.

2. One hundred twenty-three thousand six hundred seventy-five and thirty-four hundredths dollars ($123,675.34), being one-eighth of the net proceeds after deducting freight, treatment, mining, hoisting, milling and working expenses, of all of said ores taken from said Skookum mine between March 15th, 1899, and February 15th, 1902.

3. Seven thousand nine hundred ninety-three and twenty-seven*th* hundredth- ($7,993.27), being interest on the amounts mentioned in subdivisions one and two, to wit: one hundred and sixty-two thousand two hundred and fifty-two and 74-100 dollars ($162,252.75), from February 15th, 1902, until the date of this decree.

4. Five thousand six hundred and twenty-one dollars, being one-eighth of the net proceeds, after deducting freight and treatment, mining, milling, hoisting and working expenses, including charge for use of improvements of all said ores taken from said Skookum mine between February 15th, 1902, and May 18th, 1902.

It is further ordered and decreed, that interest shall be allowed on the amount of this decree from the date of entry at the rate of seven (7) per cent. per annum; and that complainant have and recover his costs, including amount paid the master.

It is further ordered that the First National Bank of Wallace, Idaho, pay to Kennedy J. Hanley all moneys (amounting to $5523.42) deposited in said bank to the credit of this court in this cause, pursuant to the order of the court made February 11th, 1902, and when paid said amount shall be a credit upon the judgment as aforesaid.

Dated this 17th day of November, 1902.

JAS. H. BEATTY, Judge.

Attest:

[SEAL.] A. L. RICHARDSON, Clerk.

Costs taxed Nov. 28, 1902, at $361.20.

A. L. RICHARDSON, Clerk.

(Endorsed:) No. 148. In the United States circuit court, district of Idaho, northern division. Kennedy J. Hanley, plaintiff, *vs.* Charles Sweeny *et al.*, defendants. Final decree. Filed Nov. 17th, 1902. A. L. Richardson, clerk.

* * * * * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

Before Gilbert, Ross, and Morrow, Circuit Judges.

CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE State-Idaho Mining and Developing Company (a Corporation), Appellants,
vs.
KENNEDY J. HANLEY, Appellee. } No. 848.

Before Gilbert, Ross, and Morrow, Circuit Judges.

KENNEDY J. HANLEY, Appellant,
vs.
CHARLES SWEENY, F. LEWIS CLARK, and THE EMPIRE State-Idaho Mining and Developing Company (a Corporation), Appellees. } No. 934.

Before Gilbert, Ross, and Morrow, Circuit Judges.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING Company, Appellant,
vs.
KENNEDY J. HANLEY, Appellee. } No. 933.

Motion for Injunction before Gilbert and Ross, Circuit Court Judges, and Hawley, District Judge.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, Appellant,
vs.
KENNEDY J. HANLEY, Appellee.

Opinion U. S. C. C. A.

Appeal from the Circuit Court of the United States for the District of Idaho, Northern Division.

Ross, circuit judge, delivered the opinions of the court.

In the case of Hanley *vs.* Sweeny *et al.*, 109 Fed. 712, it was here adjudged, among other things, that the deed from Hanley to Sweeny and Clark, the predecessors in interest of the Empire State-Idaho Mining and Developing Company, for his undivided one-eighth interest in the Skookum mine, was never in fact delivered, but was gotten possession of by Clark and Sweeny without consideration and in fraud of Hanley's rights, and that it was accordingly void and of no effect. After the cause was returned to the court below for further proceedings not inconsistent with the opinion of this court,

the defendants in the suit, who were engaged in extracting ore from beneath the claim in question and appropriating the same to their own use, in hostility to any and all claim thereto on the part of Hanley, subsequently continued to do so under the claim that the ore so found beneath the surface of the Skookum claim was a part of a vein having its apex in the San Carlos mining claim that belonged to them, and that it constituted no part of the Skookum mine. The court thereupon, on the application of Hanley, stopped them from so doing, by its writ of injunction, to continue until the further order of the court, and committed to a master the taking of an accounting of the antecedent working of the ground by the defendants to the suit. Thereupon the latter brought the appeal numbered 848 from the order granting that injunction.

The circumstances of the case were such as, in our judgment, rendered proper the granting of the temporary injunction. The order appealed from in the case numbered 848 is accordingly affirmed with costs.

After the taking of the accounting above mentioned, and after a hearing of the objections made thereto by the respective parties the court below rendered the following final decree in the cause:

"This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof and in pursuance of the mandate of the United States circuit court of appeals, in this cause, it was ordered, adjudged and decreed as follows:

I.

"That the conveyance made by Kennedy J. Hanley to Charles Sweeny and F. Lewis Clark, on April 30, 1898, of a one-eighth interest in the Skookum patented mine and mining claim, and the ore therein contained, which said mine is situated in Yreka mining district, Shoshone county, Idaho, is hereby canceled, set aside, and declared to be null and void from its date.

II.

"That the defendants, Charles Sweeny, F. Lewis Clark, and The Empire State-Idaho Mining and Developing Company have and each of them has, no interest or estate whatever in or to an undivided one-eighth interest in and to the said Skookum mine and mining claim and the ores therein contained. That the complainant, Kennedy J. Hanley, since April 30, 1898, has been and now is the owner of an undivided one-eighth interest in and to said Skookum mine and mining claim and the ores therein contained, and said interest is hereby quieted in him.

III.

"That complainant, Kennedy J. Hanley, have and recover from defendant Empire State-Idaho Mining and Developing Company the

sum of one hundred seventy-five thousand eight hundred sixty-seven and two hundredths dollars ($475,867.02), comprising the following items:

"1. Thirty-eight thousand five hundred seventy-seven and forty-one hundredths dollars ($38,577.41), being one-eighth of the proceeds (less freight and treatment and rebate) of said ores taken from the Skookum by defendants between May 15th, 1898, and March 18th, 1899.

"2. One hundred twenty-three thousand six hundred seventy-five and thirty-four hundredths dollars ($123,675.34), being one-eighth of the net proceeds after deducting freight, treatment, mining, hoisting, milling and working expenses, of all of said ores taken from said Skookum mine between March 15th, 1899, and February 15th, 1902.

"3. Seven thousand nine hundred and ninety-three and twenty-seven hundredth- ($7,993.27), being interest on the amounts mentioned in subdivisions one and two, to wit, one hundred and sixty-two thousand two hundred and fifty-two and 74-100 dollars ($162,252.75), from February 15th, 1902, until the date of this decree.

"4. Five thousand six hundred and twenty-one dollars, being one-eighth of the net proceeds, after deducting freight and treatment, mining, milling, hoisting and working expenses, including charge for use of improvements of all said ores taken from said Skookum mine between February 15th, 1902, and May 18th, 1902.

"It is further ordered and decreed, that interest shall be allowed on the amount of this decree from date of entry at the rate of seven (7) per cent. per annum; and that complainant have and recover his costs, including amount paid the master.

"It is further ordered that the First National Bank of Wallace, Idaho, pay to Kennedy J. Hanley all moneys (amounting to $5,523.42) deposited in said bank to the credit of this court in this cause, pursuant to the order of the court made February 11th, 1902, and when paid said amount shall be a credit upon the judgment as aforesaid.

"Dated this 17th day of November, 1902.

"JAS. H. BEATTY, Judge."

It will be noticed that by this final decree the injunction theretofore granted was not continued in force. Upon the entry of the final decree the temporary injunction came to an end. Gardner *vs.* Gardner, 87 N. Y. 14; Eureka Con. Min. Co. *vs.* Richmond Min. Co., 5 Sawyer, 121; Ency. of Plead. & Prac. vol. X, 1029; Buffington *vs.* Harvey, 95 U. S. 99.

A motion was subsequently made on behalf of the defendants to the suit for an order dissolving the preliminary injunction, which motion the court below denied. Whether or not it was the real reason for that action of the court, it is a sufficient reason therefor that no such injunction was then in force, it having come to an end by the entry of the final decree in the cause making no provision for any injunction. From that final decree both parties appealed to

this court, which cross appeals are presently to be considered and disposed of.

The final decree established in Hanley an undivided one-eighth interest in the mine and mining claim in controversy; the Empire State-Idaho Mining and Developing Company, as the successor in interest of Sweeny and Clark ow-ing the majority thereof, and with no injunction against its working the property. Some time after the entry of the final decree mentioned, to wit, in the month of March, 1903, that company again commenced mining under the surface of the Skookum claim, having taken the advice of its counsel to the effect that it had that right, and, under like advice, set apart and deposited in bank one-eighth of the net proceeds thereof for the protection of Hanley as well as itself. That course has been since pursued, until now and here this court is asked, without any showing of any fraud in the mining operations of the company, or any unminerlike working of the ground, to enjoin the company from mining further, and thus tie the property up.

We are of the opinion that under the provisions of the statute of Idaho, as construed by the supreme court of that State which construction is binding upon the Federal courts in respect to property situated in that State, as is that here involved, the owner of the majority interest in such property is entitled to mine and control its operations, in the absence of any showing of fraud or wrongdoing—accounting, of course, to the owner for his proportion of the net proceeds. Hawkins *vs.* Spokane Hydraulic M. Co., 28 Pac. 433; *id.*, 33 Pac. 40.

The application here made for an injunction is therefore denied, with costs to the defendants.

The appeal of the Empire State-Idaho Mining and Developing Company from the final decree above mentioned, is mainly based upon the claim that the ore found under the surface of the Skookum mining claim, and which has been and is being mined by it, is a part of a vein having its apex within the San Carlos mining claim owned by the company, and constitutes no part of the Skookum mine or mining claim; and on the accounting above mentioned, and again before the trial court when that accounting was brought before it, it sought to show that such was the fact. But the court below, as did the master, held, and properly held, that the matter was foreclosed by the prior decisions of this court in the cause. The learned counsel of the Empire State-Idaho Mining and Developing Company again seek to raise the point, that under the pleadings in the original action of Hanley *vs.* Sweeny, *supra*, no such question could have been adjudicated; but in reply to the same suggestions made in the mandamus case of Hanley *vs.* Beatty, district judge, 117 Fed. 59, this court said:

"Section 4538 of the Revised Statutes of Idaho provides that 'an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.' Under this statute the circuit

court has jurisdiction upon the pleadings to determine the entire controversy between the parties respecting the Skookum mine and the ores therein contained. Holland *vs.* Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Reynolds *v.* Bank, 112 U. S. 405; 5 Sup. Ct. 213, 28 L. Ed. 733. It was the duty of the defendants to interpose all the defenses they had to the action, and, having failed to do so, the defendant The Empire State-Idaho Mining and Developing Company is debarred from interposing a defense which they had at that time by a new action. Burton *vs.* Huma (C. C.), 37 Fed. 738. In Dowell *vs.* Applegate, 152 U. S. 327, 345, 14 Sup. Ct. 611, 38 L. Ed. 463, the rule in such a case is stated to be: 'A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to any ground which might have been presented.'

"Testimony on behalf of the defendants is referred to as tending to show that the apex of the vein containing the ore in the Skookum mine was outside the surface location of that claim, and it is contended that, because counsel for the complainant objected to this testimony as irrelevant and immaterial, he must be deemed as having objected because that issue was not involved in the case. No such inference can be drawn from the proceedings. It was not claimed that this testimony tended to show that the apex of the vein was outside the Skookum claim and in some other claim owned by the defendants, and unless that was the purpose of the testimony, and it tended to establish that fact, it was clearly irrelevant and immaterial. The defendants were required to prove whatever adverse title they had, and, unless the testimony tended to establish such a title, it was subject to complainant's objection. The testimony is, however, in the record, and it is not claimed now that, as it appears in the record, it tends in any way to establish such a defense. Moreover, no ruling of the court below excluding such testimony was brought here on the appeal, and if any inference is to be drawn from this feature of the proceedings, it is that the defendants did not consider the question as to the apex of the Skookum vein as being an issue in the case." That decision has become the law of the case, and the question is not now open to further consideration.

It is further objected, on the appeal of the Empire State-Idaho Mining and Developing Company from the final decree of the court below, that under no circumstances is Hanley entitled to recover anything more than one-eighth of the net proceeds of the ore mined by it from the Skookum claim, while, on the appeal of Hanley from the same decree, he contends that the court below erred in restricting his recovery to net proceeds in the respect hereinafter shown and also in refusing to extend the judgment given him to Sweeny and Clark personally.

The suit was commenced March 18, 1899. The Empire State-Idaho Mining and Developing Company had then been mining the ore in question since May 15, 1898, and appropriating the whole thereof to its own use. It continued to do so until February 15, 1902,

on which day the court below denied an injunction and receiver therefore applied for by Hanley against the company, but ordered the latter "to deposit in the First National Bank of Wallace, Idaho, in the name and to the credit of the United States circuit court, in and for the district of Idaho, in the cause entitled Kennedy J. Hanley, complainant, *vs.* Charles Sweeny *et al.*, defendants, No. 148, one-sixteenth of the gross proceeds of all ore taken from underneath the surface of the Skookum mining claim described in the complaint herein, *such deposit to be made subject to the order of this court in* this cause. By the term 'gross proceeds' is meant the entire proceeds of the ore mined less the cost of sampling, freight and treatment charges."

The company continued to mine the ore in question, and to deposit one-sixteenth of the gross proceeds thereof, as required by the order just quoted until May 18, 1902, when the injunction herein first spoken of was granted.

The report of the master was to the effect that Hanley was entitled to one-eighth of the proceeds (less freight and treatment and rebate) of the ores taken from the Skookum mine from May 15, 1898, to February 15, 1902, and to one-eighth of the net proceeds "after deducting freight, treatment, mining, hoisting, milling and working expenses." with certain interest, etc., from February 15, 1902, to May 15, 1902. The court below confirmed the report of the master in so far as it covered the period of operations extending to the commencement of the suit, and from February 15, 1902 (the date the deposit of one-sixteenth of the gross proceeds was required to be made), to May 18, 1902 (when the injunction was granted), but held that from the time of the commencement of the suit until the making of the order denying Hanley's application for an injunction and a receiver, and requiring the deposit mentioned, Hanley was only entitled to one-eighth of the net proceeds, saying in its opinion in respect to the mining of the ore in question during that period:

"When this action was commenced, the complainant knew defendant was extracting the ores in which he claimed an interest; he so alleged, and the developments at the trial show he was advised. When it is made to appear with reasonable certainty that wasteful trespass is being made upon property, courts will take some prudent means of protecting the rights of all the interested parties. Such certainly has been the practice of this court. True, not always by the expensive management of a receiver or the destructive injunction, but at lease by some temporary sequestration of proceeds. The question is, was the complainant, knowing that defendant was extracting the ore he claimed, justified in quietly looking on, and then long after, not only claiming the ores, but their value as enhanced through the labor and expenditures of a defendant. Or, did he not, by his silence, acquiesce in the trespass? The presumption is, that had he asked protection, such action would have followed that the rights of both parties would have been conserved. Were it shown that he, knowing that defendant was taking his property, avoided

asking the court's protection with the intention of permitting defendant to extract these ores, and of then demanding their gross value, such a demand would not be tolerated by any court of equity. Now, whether complainant stood silent from such motive, or from oversight or misconception of his rights, the result is the same to the defendant. Admit that the defendant was committing a wrong, this does not justify another, of either omission or commission, by complainant. Equity does not permit the wrong of one to inure to the benefit of another who also does wrong. The punitive rule can be invoked only when the defendant is clearly in the wrong and the complainant is as clearly without fault. My opinion is that complainant was so derelict that he cannot claim a benefit thereby. The cases cited in which punitive damages were allowed do not show that the plaintiffs had any knowledge of the trespass while it was going on, or that they in any way acquiesced in it."

The case shows that from the beginning of the mining of the ore in controversy to at least the time of the decision of this court on May 6, 1901, in the case of Hanley *vs.* Sweeny *et al.*, 109 Fed. 712, the defendants to the suit claimed Hanley's interest in the mine in question by virtue of the deed here adjudged never to have been delivered, but to have been fraudulently gotten possession of by Sweeny and Clark, during all of which period they unlawfully and fraudulently excluded Hanley from the mine. It is true, as we have above decided, that under the statutes of Idaho, as construed by the supreme court of that State, those holding the majority interest in a mine or mining claim in that State have the right to mine and control the operations of the entire mine, if done honestly and properly. but not to the exclusion of their co-owner, who has the clear legal and equitable right to access to any and every part of the property, and to its proper inspection, to the end that he may see that his rights are respected and protected, and that he may receive his just proportion of the net proceeds. Where, however, as in this case, during a long portion of the time the ore in controversy is being mined, the owner of an undivided minority interest is excluded from the premises, and his ore as well as that of the majority owners extracted and disposed of, the act cannot, in our opinion, but be fairly regarded as a willful and unlawful trespass; in which cases the law very justly holds the wrongdoer responsible for the gross value of the property unlawfully taken (Wooden-Ware Co. *vs.* United States, 106 U. S. 432); in which case, through an action at law, the court quoted with approval the following statement of Lord Hatherley in the House of Lords, in the case of Livingstone *vs.* Rawyards Coal Co., 5 App. Cas, 25, to the effect that the same doctrine is applicable to cases in equity. "There is no doubt," said he, "that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole

of the property which he has so furtively taken, and making him no allowance in respect to what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

See, also, Benson Mining Co. *vs.* Alta Mining Co., 145 U. S. 428; Pine River Logging Co. *vs.* United States, 22 Sup. Ct. Rep. 920; Foster *vs.* Weaver, 118 Pa. 42; Sears *vs.* Sellen, 28 Iowa, 501; Bainbridge on Mines, 1st American edition, page 448; Guckenheimer *vs.* Angevine, 81 N. Y. 394.

We are unable to perceive any force in the suggestion that where the excluded tenant in common knows of the willful trespass and does not apply for a preliminary injunction on commencing suit, he should be allowed only the net proceeds appertaining to his interest. It may well be responded that the bringing of suit is notice to the wrongdoer that he excludes his co-owner at his peril. Moreover, the various records in the present suit negative the suggestion that Hanley was in any respect derelict in the prosecution of his rights in respect to his ownership of an undivided one-eighth of the mine in question; on the contrary, they show that he was vigorous in the assertion of them, while the defendants to the suit were active in their denial of any interest therein on his part and in his absolute and entire exclusion from the premises. Nor do we think the complainant can be deprived of the proportion of the proceeds of the ore in question properly appertaining to his interest therein, because of this allegation contained in his bill: "Your orator further shows that the ores contained in said Skookum mine are of such value that there has been taken out of said ore body then disclosed in said ground, up to the present time, ore to the value of not less than one hundred and fifty thousand dollars ($150,000.00) net, over and above the cost of mining, treating, extracting and marketing the same, of which your orator is entitled to the share represented by his interests in said Skookum mine theretofore set forth." This is not an averment to the effect that the complainant is only "entitled to a portion of the net proceeds." In his prayer he expressly asked, among other things, "that the defendants be held to account for your orator's share of the proceeds of said Skookum mine taken therefrom by the said defendants."

We think that there is nothing in the bill to preclude the complainant's recovery of the amounts shown by the accounting to be equitably his due.

For the reasons stated, we are of opinion that that portion of the third subdivision of the final decree of the court below, reading: "That complainant, Kennedy J. Hanley, have and recover from defendant, Empire State-Idaho Mining and Developing Company, the

sum of c hundred seventy-five thousand eight hundred sixty-seven and two-hundredths dollars ($175,867.02), comprising the following items:

"1. Thirty-eight thousand five hundred seventy-seven and forty-one hundredths — ($38,577.41), being one-eighth of the proceeds (less freight and treatment and rebate) of said ores taken from the Skookum by defendants between May 15th, 1898, and March 18th, 1899.

"2. One hundred twenty-three thousand six hundred seventy-five and thirty-four hundredths dollars ($123,675.34), being one-eighth of the net proceeds after deducting freight, treatment, mining, hoisting, milling and working expenses, of all said ores taken from said Skookum mine between March 18th, 1899, and February 15th, 1902.

"3. Seven thousand nine hundred and ninety-three and twenty-seven hundredths dollars ($7,993.27), being interest on the amounts mentioned in subdivisions one and two, to wit, one hundred and sixty-two thousand two hundred and fifty-two and 74-100 dollars ($162,252.75), from February 15th, 1902, until the date of this decree.

"4. Five thousand six hundred and twenty-one dollars, being one-eighth of the net proceeds, after deducting freight and treatment, mining, milling, hoisting and working expenses, including charge for use of improvements of all of said ores taken from said Skookum mine between February 15th, 1902, and May 18th, 1902"—must be so modified as to award the complainant Hanley judgment for one-eighth of the gross value at the mine of all ore extracted by the Empire State-Idaho Mining and Development Company therefrom up to the time the defendants to the suit ceased to exclude him from the mine and to give him or his representatives free access thereto and inspection thereof; and thereafter, for one-eighth of the net value of all ore so mined by the defendant company from the mine or mining claim in question, together with legal interest on all moneys so accruing to Hanley prior to February 15, 1902, from that date (the appellant Hanley being precluded by his assignment of errors from claiming any interest prior thereto); and with legal interest on all moneys subsequently accruing to him from the dates when they respectively accrued.

As the case shows that all of the mining complained of was done by the defendant Empire State-Idaho Mining and Developing Company, and that none of the ore was extracted or appropriated by the defendants Sweeney and Hanley individually, the personal judgment asked for against them cannot be given.

The cause is remanded to the court below, with directions to modify the final decree as above indicated, taking, if necessary, further proof as to the time when the defendants to the suit ceased to exclude the complainant Hanley from the mine in question, and gave or offered to him or his representatives free access thereto and free inspection thereof, and such other proof as may be needed, and when

so modified, it will stand affirmed; the appellant Hanley to recover costs on this appeal.

(Endorsed:) Nos. 848, 934, and 933. In the United States circuit court of appeals for the ninth circuit. Opinion. Filed November 9, 1903. F. D. Monckton, clerk.

* * * * * * *

United States Circuit Court of Appeals for the Ninth Circuit.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING Company, Appellant,
vs.
KENNEDY J. HANLEY, Appellee. } No. 933.

Decree.

Appeal from the Circuit Court of the United States for the District of Idaho, Northern Division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, northern division, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court, that that portion of the third subdivision of the final decree of the said circuit court reading: "That complainant, Kennedy J. Hanley, have and recover from the defendant, Empire State-Idaho Mining and Developing Company, the sum of one hundred seventy-five thousand eight hundred sixty-seven and two hundredths dollars ($175,867.02), comprising the following items:

"1. Thirty-eight thousand five hundred seventy-seven and forty-one hundredths — ($38,577.41), being one-eight of the proceeds (less freight and treatment and rebate) of said ores taken from the Skookum by defendants between May 15th, 1898, and March 18th, 1899.

"2. One hundred twenty-three thousand six hundred seventy-five and thirty-four hundredths dollars ($123,675.34), being one-eighth of the net proceeds after deducting freight, treatment, mining, hoisting, milling and working expenses, of all of said ores taken from said Skookum mine between March 18th, 1899, and February 15th, 1902.

"3. Seven thousand nine hundred ninety-three and twenty-seven hundredths dollars ($7,993.27), being interest on the amounts mentioned in subdivisions one and two, to wit: one hundred and sixty-two thousand two hundred and fifty-two and 74-100 dollars ($162,252.75), from February 15th, 1902, until the date of this decree.

"4. Five thousand six hundred and twenty-one dollars, being one-eighth of the net proceeds, after deducting freight and treatment, mining, milling, hoisting and working expenses, including charges for use of improvements of all said ores taken from said Skookum mine between February 15th, 1902, and May 18th, 1902"—

in this cause be so modified as to award the complainant Hanley judgment for one-eighth of the gross value at the mine of all ore extracted by the Empire State-Idaho Mining and Developing Company therefrom up to the time the defendants to the suit ceased to exclude him from the mine and to give him or his representatives free access thereto and inspection thereof; and thereafter, for one-eighth of the net value of all ore so mined by the defendant company from the mine or mining claim in question, together with legal interest on all moneys so accruing to Hanley prior to February 15, 1902, from that date (the appellant Hanley being precluded by his assignment of errors from claiming any interest prior thereto); and with legal interest on all moneys subsequently accruing to him from the dates when they respectively accrued; and the cause is remanded to the said circuit court, with directions to modify the final decree as above indicated, taking, if necessary, further proof as to the time when the defendants to the suit ceased to exclude the complainant Hanley from the mine in question, and gave or offered to him or his representatives free access thereto and free inspection thereof, and such other proof as may be needed, and when so modified, it will stand affirmed; the appellant Hanley to recover costs on this appeal.

(Endorsed:) Decree. Filed and entered Nov. 9, 1903. F. D. Monckton, clerk.

* * * * * * *

In the United States Circuit Court, District of Idaho, Northern Division.

KENNEDY J. HANLEY, Complainant,
vs.
CHARLES SWEENEY, F. LEWIS CLARK, and EMPIRE STATE-IDAHO Mining and Developing Company, Defendants.

Modified Decree.

In pursuance of the mandate of the United States circuit court of appeals, for the ninth circuit, filed herein on the 19th day of March, 1904, and the decree and opinion of that court referred to in said mandate, which said mandate directs this court to modify the final judgment and decree entered herein November 17th, 1902, this cause came on for further proceedings upon motion of counsel for complainant; and the court of appeals having determined that Hanley was fraudulently excluded from the mine until at least May 6, 1901, and said court having directed this court to fix the date when defendants ceased to exclude Hanley and gave or offered to give him or his representatives free access thereto, and to modify the judgment, and this court having determined that the defendants to the suit did not cease to exclude Hanley from the mine and did not

give, or offer to give him or his representatives free access thereto, and inspection thereof, until January 1, 1902, it is now ordered, adjudged and decreed that the decree heretofore entered in this cause on the 17th day of November, 1902, be and the same is hereby so modified that the same shall read as follows:

I.

That the conveyance made by Kennedy J. Hanley to Charles Sweeney and F. Lewis Clark on April 30th, 1898, of a one-eighth interest in the Skookum patented mine and mining claim, and the ore therein contained, which said mine is situated in Yreka mining district, Shoshone county, Idaho, is hereby canceled, set aside and declared to be null and void from its date.

II.

That the defendants, Charles Sweeney, F. Lewis Clark and the Empire State-Idaho Mining and Developing Company have, and each of them has, no interest or estate whatever in or to an undivided one-eighth interest in and to the said Skookum mine and mining claim and the ores therein contained. That the complainant, Kennedy J. Hanley, since April 30th, 1898, has been and now is the owner of an undivided one-eighth interest in and to said Skookum mine and mining claim and the ores therein contained, and said interest is hereby quieted in him.

III.

That complainant, Kennedy J. Hanley, have and recover from defendant Empire State-Idaho Mining and Developing Company the sum of two hundred sixty thousand six hundred seventy-two and forty-three hundredths dollars ($260,672.43), with interest on two hundred fifty-five thousand fifty-one and forty hundredths dollars ($255,051.40), from February 15th, 1902, until paid, at seven per cent. per annum, and costs amounting to three hundred sixty-one and twenty hundredths dollars ($361.20) the said sum comprising the following items:

1. Two hundred forty-nine thousand, two hundred eighty-seven and forty-six hundredths dollars ($249,287.46), being one eighth of the gross proceeds less freight, treatment and rebate of said ores taken from said Skookum mine and mining claim by defendants between May 15th, 1898, and March 18th, 1899, and between March 18th, 1899, and January 1, 1902.

2. Five thousand seven hundred and sixty-three and ninety-seven hundredths dollars ($5,763.97), being one-eighth of net proceeds from ores taken from said Skookum mine by defendants from January 1, 1902, to February 15, 1902.

3. Five thousand six hundred twenty-one dollars ($5,621), being one-eighth of the net proceeds after deducting freight and treatment,

mining, milling, hoisting, and working expenses, including charges for use of improvements, of all said ores taken from the said Skookum mine between February 15th, 1902, and May 18th, 1902.

And it appearing further from the records in this cause that immediately after November 17th, 1902, upon presentation of a copy of the decree of November 17, 1902, the First National Bank of Wallace, Idaho, did pay to Kennedy J. Hanley, $5,523.42; it is therefore ordered that the said amount shall be and is a credit upon the aforesaid decree from November 17, 1902, reducing the amount mentioned in paragraph three by said sum of $5,523.42.

And whereas, the complainant herein by separate appeal to the said circuit court of appeals from the said decree did secure a modification of said decree in his favor with costs of his appeal taxed at $926.60, which said modification has been made, and it is decreed therefore that said Hanley shall recover from defendant company in addition to the sums hereinabove specified, the further sum of $926.6 as costs on his said appeal.

And whereas, an appeal was taken by the Empire State-Idaho Mining and Developing Company from the said decree entered Novem 17, 1902, to the United States circuit court of appeals for the ninth circuit, whereby it was sought to reverse said decree, and for the purpose of securing a stay of proceedings and superseding the said judgment so entered on November 17, 1902 (for the sum o' $175,867.02), the Empire State-Idaho Mining and Developing Company as principal and the American Bonding Company of Baltimore as surety, did on the 24th day of November, 1902, make and execute a supersedeas bond (which said bond was approved by a judge of this court), and was thereafter filed in this court, and said bond bound the said principal and surety to Kennedy J. Hanley in the sum of two hundred thousand dollars ($200,000) and was conditioned that if said Empire State-Idaho Mining and Developing Company should prosecute its said appeal from said judgment and decree of November 17th, 1902, to effect and answer all damages and costs if it fails to make its said appeal good the obligation should be void; otherwise to remain in full force and effect; and

Whereas, at the time of the execution of said bond there was due to complainant under the decree aforesaid as it then stood a balance of one hundred and seventy thousand three hundred forty-three and sixty hundredths dollars ($170,343.60) (the sum of $5,523.42 having been paid by the bank), together with costs accruing in said circuit court amounting to three hundred sixty-one and twenty hundredths dollars ($361.20), and with interest upon the said balance at seven per cent. (7%) from November 17th, 1902; and

Whereas, the Empire State-Idaho Mining and Developing Company failed to prosecute its said appeal to effect and failed to make its said appeal good, and failed to answer any of the damages or any costs, and the said liability upon the bond thereby became fixed; and

Whereas, obligee, the complainant herein, was allowed costs on said appeal in the sum of $28.10;

And it appearing further that no part of said obligation has been paid and the said judgment and decree and every part thereof (excepting the money paid by the bank as heretofore specified) remains entirely unsatisfied:

Now, therefore, it is hereby ordered, adjudged and decreed that Kennedy J. Hanley have and recover from the Empire State-Idaho Mining and Developing Company and from the American Bonding Company of Baltimore, or either of them, the sum of $170,343.60 with interest from November 17th, 1902, until paid at the rate of 7% per annum, and with costs amounting to $387.30 and complainant herein is entitled to execution; it being further provided that the payment of the said sum of $170,343.60 with interest from November 17th, 1902, and costs by either the said Empire State-Idaho Mining and Developing Company or the American Bonding Company of Baltimore shall discharge the said American Bonding Company of Baltimore of all liability to complainant under the said bond and shall to the extent of the amount paid apply on as part payment of the decree and judgment first above set forth.

It is further ordered, adjudged and decreed that complainant have his execution for the said amounts and for costs.

Dated this 10th day of May, 1904.

JAS. H. BEATTY, Judge.

Attest:
[SEAL.] A. L. RICHARDSON, Clerk.

(Endorsed:) Filed May 10th, 1904. A. L. Richardson, clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY and American Bonding Company, Appellants,
vs.
KENNEDY J. HANLEY, Appellee.

Opinion U. S. Circuit Court of Appeals.

Geo. Turner and F. T. Post for the Appellants.
M. A. Folsom for the Appellee.

Before Gilbert, Ross, and Morrow, Circuit Judges.

GILBERT, circuit judge, delivered the opinion of the court.

On November 9, 1903, this court rendered a decree in the above entitled cause, remanding the same to the court below with directions to modify its final decree in certain respects specified and directing it to take, if necessary, further proof as to the time when the

defendants to the suit, the appellants herein, ceased to exclude the appellee from the mine in question, "and gave or offered to him or his representatives free access thereto and free inspection thereof." In accordance with that decree the cause was remanded to the circuit court. That court appointed a special examiner to take such testimony upon the question so suggested, and return the same to the court together with his opinion thereon, his opinion to be advisory only. Testimony was accordingly taken. Thereupon a motion and petition were served and filed by the appellee for judgment against the Empire State-Idaho Mining and Developing Company, and the surety upon its supersedeas bond, the American Bonding Company. The surety entered a special appearance and objected to the rendition of a judgment against it upon the ground that it had never been served with any process or rule or order of court, and had not had its day in court, and that the court was without jurisdiction to render a judgment against it. The circuit court found from the evidence that the appellee was excluded from the mine up to Jan. 1, 1902, and that thereafter he was not excluded, and it accordingly entered a decree against the mining company for $260,672.43 and a decree against the American Bonding Company for $170,343.60, the amount of the decree from which the former appeal was taken.

The assignments of error present some questions which have already been adjudicated by this court, and which will therefore not be here re-considered. The questions that are new are first, did the trial court err in holding that the appellee was excluded from the mining property up to Jan. 1, 1902? and second, was that court without jurisdiction to render a judgment against the American Bonding Company? As to the exclusion of the appellee from the mining property, the appellants contend that he was not in fact excluded therefrom at any time, but that if there were at any time theoretical exclusion, it ceased on May 6, 1901. The date so mentioned is the date of the decree of this court in the case of Hanley *v.* Sweeney, 109 Fed. 712, in which it was held that the appellee herein was the owner of an undivided one-eighth of the Skookum mine, and that his conveyance of that interest had been fraudulently obtained by the opposing parties in that suit. The present suit was brought by the appellee herein, to obtain an injunction against the further operation of the mine by the appellant, the Empire State-Idaho Mining & Developing Company, and to obtain an accounting of the antecedent working of the ground by said appellant. Upon the appeal from the decree of the circuit court, this court, in Sweeney *v.* Hanley, 126 Fed. 102, said: "The case shows that from the beginning of the mining of the ore in controversy to at least the time of the decision of this court on May 6, 1901, in the case of Hanley *v.* Sweeney *et al.*, 109 Fed. 712, the defendants to the suit claimed Hanley's interest in the mine in question by virtue of the deed here adjudged never to have been delivered, but to have been fraudulently gotten possession of by Sweeney and Clark, during all of which period, they unlawfully and fraudu-

lently excluded Hanley from the mine," and this court in its opinion further said that the decree of the circuit court "must be so modified as to award the complainant, Hanley, judgment for one-eighth of the gross value at the mine of all ore extracted by the Empire State-Idaho Mining & Developing Company therefrom up to the time the defendants to the suit ceased to exclude him from the mine, and to give him or his representatives free access thereto and inspection thereof, and thereafter for one-eighth of the net value of all ore so mined by the defendant company from the mine or mining claim in question, together with legal interest etc." It thus appears that it is settled by the adjudication of this court that the exclusion of the appellee from the mine continued at least until May 6, 1901, The fact that the views of the court so expressed in the opinion are not contained in the mandate which issued to the lower court, renders them no less conclusive as the law of the case. Thompson v. Maxwell, 168 U. S. 451.

The trial court found that the exclusion of the appellee continued until Jan. 1, 1902. That date was fixed as the date of the termination of the exclusion for the reason that it was shown that at that time a limited permission, through an order of the court, was given to the appellee's engineers and his watchman to enter the mining ground. The evidence that the exclusion continued until that date consists in the following facts. The decree of this court of May 6, 1901, was not complied with by the appellees in that suit. They filed in this court a petition for re-hearing in which they re-asserted their denial of Hanley's right to the property or to relief in equity. After the denial of that petition, they made an application to the supreme court for a writ of certiorari to review the judgment of this court. That application was pending until Jan. 13, 1902. In December, 1901, the appellee herein presented an application to the circuit court for an injunction and an order of reference supported by his affidavit in which he deposed that the defendant company had constantly refused to permit him to enter the underground workings of said property for the purpose of working said property or inspecting the same, and that it had excluded him from entering said property for any purpose whatsoever. The Empire State-Idaho Mining & Developing Company, in opposition to the motion and application, replied to that affidavit, but did not deny the alleged fact of the exclusion of the appellee. Upon the hearing on that motion and application, counsel for said mining company in the presence of the general manager and other officers thereof, vigorously objected to an order of the court permitting the appellee to enter the mine, upon the ground that he had no right therein. Later, when the appellee presented to the circuit court his petition, in said case for the appointment of a receiver and an injunction, together with his affidavit in support thereof, the resident manager of the mining company, on Feb. 6, 1902, presented his counter-affidavit in opposition thereto, in which he admitted that said mining company "and its officers and agents have

refused to permit the said Hanley to enter its underground workings; that it has no underground workings in which the said Hanley has any interest or into which he is entitled to enter. Deny that the said Hanley, for the purpose of working the said Skookum mine or inspecting the same, or for any purpose, has any right to enter therein through any workings of the respondent corporation. Admit that the respondent corporation has claimed exclusive title and right of possession to its said workings and has excluded plaintiff from entering therein for any purpose whatever. Deny that the said plaintiff has any right to enter into or within the workings of the corporation defendant, except by virtue of such orders as the court may make authorizing him to enter such workings for the purpose specified in said order. Denies that any order has been made by said court authorizing said Hanley to enter within the workings for any purpose, and admit that on the 23rd day of January, 1901, the corporation defendant did forbid the said Hanley entering into the said workings." Against the force of these admissions of the affidavit, counsel for the appellants contend that the mining company was not seeking to obtain any relief based upon that paper. They admit that the appellee had in his affidavit alleged his exclusion from the mine as one of the reasons why he was entitled to an injunction and the appointment of a receiver, and that the counter affidavit is possibly an admission of that statement in a qualified way for the purpose of that hearing, but they argue that so far as the hearing was concerned, it was immaterial whether the appellee were excluded from the mine or not. But whatever may have been the purpose of the affidavit, and however immaterial the question of the exclusion of the appellee from the mine may have been to the questions involved on the hearing of that application, the affidavit nevertheless shows clearly and distinctly the hostile attitude of the mining company toward the question of the admission of the appellee to the mining property, an attitude that so far as the evidence shows had been continuous and uninterrupted upon the part of the mining company and its predecessors in interest from the beginning of the litigation. It is true that the evidence in this case contains the admission of the appellee that he did not at any time between May 6, 1901 and Jan. 1, 1902, ask the privilege of entering the mine, but it is also true that the mining company never offered him that privilege. Counsel for the appellants argue that if there were exclusion in February, 1902, that fact would not tend to prove exclusion during the period between May 6, 1901, and January 1, following, and that presumptions do not work backwards. But we think the fair presumption is that an exclusion shown to have existed in and long prior to May, 1901, and to have existed in December and February following, was continuous between those periods, and that to show that it was so continuous the appellee was not required to prove a specific act of exclusion on either or any of the intervening days. The admission of the appellee's agents to the mine on Jan. 1,

1902, was not the voluntary act of the mining company. It was obtained only upon the order of the circuit court and against the opposition of the mining company. We find no error therefore in the finding of the circuit court that the exclusion continued at least until that date.

It remains to be considered whether the circuit court erred in entering a decree against the American Bonding Company of Baltimore. In November, 1902, the decree of the circuit court was entered in favor of the appellee for $175,867.02, and costs. Of that amount the appellee collected $5,523.42. Both parties appealed from the decree. Upon hearing the appeals, this court directed a modification of the decree in favor of the appellee herein. A supersedeas bond in the sum of $200,000.00, with the American Bonding Company as surety, had been given by the mining company upon its appeal. That appeal not having been sustained by this court, both the principal and the surety became liable for the amount of the decree appealed from. After the mandate of this court was filed in the court below, the appellee herein filed a motion to proceed, and gave notice to the appellants that he would apply for a summary decree upon the bond. Prior to the filing of the examiner's report, the appellee filed his petition and motion for summary judgment upon the bond, and gave due notice of his intention to present the motion. Service was made upon the mining company, and upon the vice-president of the American Bonding Company. Service upon the latter was admitted in the following words: "Service of the foregoing motion, petition, and notice is hereby admitted this 29th day of April, 1904." On the day fixed for the hearing, the appellants appeared. The bonding company made objection to the entry of a summary judgment on the ground that no order to show cause had been served upon it, and it contended that the court had no jurisdiction to enter a judgment against it except upon process issued out of the court and under its seal. The statutes of Idaho, as do those of many other States, provide that judgment may be entered on motion against the sureties, by the court from which the appeal is taken, pursuant to the stipulations. Idaho Codes 1901, sec. 3576. It is held that such a provision is not only not unconstitutional, Beall *v.* New Mexico 16. Wall. 535, but that similar provisions of State laws may properly be followed by the Federal courts. Smith *et al. v.* Gaines, 93 U. S. 341. In Moore *v.* Huntington, 17 Wall. 417, Mr. Justice Miller said: "It is a very common and useful thing to provide by statute that sureties in appeal and writ of error bonds shall be liable to such judgment in the appellate court as may be rendered against their principals. This is founded on the proposition that such sureties by the act of signing the bond become voluntary parties to the suit and subject themselves thereby to the decree of the court." Independently of such statutory provisions, it has been held that Federal courts upon a mandate determining that the conditions of the bond have been broken, will enter a summary judgment against the sureties on a supersedeas bond. In

Third National Bank *v.* Gordon, 53 Fed. 471, it was held that where a judgment of the circuit court has been affirmed by the Supreme Court, and the condition of the supersedeas bond given under rule 29 of the Supreme Court has been thereby broken, judgment may be had thereon by motion against the sureties as well as the principal. The court said: "The nature and character of a supersedeas bond seem to imply a more summary remedy upon it than a suit to enforce it. The plaintiff's judgment is superseded, and he is for the time deprived of his remedy by execution to obtain the fruits of his judgment. The supersedeas bond is given and approved by the judge of the court in which the cause was heard and the judgment obtained; and the giving and acceptance of such bond are, to some extent, like a confession of judgment, if the appellant fails to maintain his contention in the appellate court." That decision was affirmed by the circuit court of appeals for the fifth circuit in Gordon *v.* Third National Bank, 6 C. C. A. 125, in which, in a carefully considered opinion, it was said: "In this connection it may be well to notice that the motion for judgment in this case has all the necessary elements of a *scire facias;* and proper notice thereof having been served on all of the obligors in the bond, and they having all appeared and the sureties having interposed demurrers, not well taken, considering it as a *scire facias*, and having failed to plead or answer, the court could well proceed to enter judgment, on the record alone without other proof." The court having found in these considerations ground to sustain the judgment of the court below, proceeded to consider the case as the parties and the court below had treated it, namely, as a proceeding authorized by the State laws of Alabama, and the practice of the United States circuit court for that State and of the United States courts in general, and found upon that ground also that it was a proceeding in accordance with the law and practice of the Federal courts. In Blossom *v.* Railroad Company, 1 Wall. 655, Mr. Justice Miller, speaking for the court, referred to the fact that after a decree adjudicating rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case in the course of subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court and render them liable to its orders, and said: "Sureties signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances." In Tyler Mining Company *v.* Last Chance Mining Company, 90 Fed. 21, this court held that a summary decree for damages upon an injunction bond could properly be entered against the sureties. Lea *v.* Deakin, 13 Fed. 514; Russell *v.* Farley, 105 U. S. 433. The trial court did not err therefore in rendering judgment against the surety on the appeal bond. The decree of that court is affirmed.

(Endorsed:) Opinion. Filed February 6, 1905. F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, Appellant,
vs.
KENNEDY J. HANLEY, Appellee.
} No. 1083. Decree. U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of Idaho, Northern Division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree Filed and entered Feb. 6, 1905. F. D. Monckton, clerk.

* * * * * * *

At a stated term, to wit: the October term, A. D. 1904 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Friday the tenth day of February in the year of our Lord one thousand, nine hundred and five.

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING Company and The American Bonding Company of Baltimore, Appellants,
vs.
KENNEDY J. HANLEY, Appellee.
} No. 1083.

Order Denying Appeal to Supreme Court U. S., etc.

Come the appellants The Empire State-Idaho Mining and Developing Company and The American Bonding Company of Baltimore and give notice in open court by their solicitor George Turner that they appeal to the Supreme Court of the United States from the final judgment and decree in this cause and from each and every other order and decree rendered in the cause:

Whereupon, the court being of the opinion that the cause is not one in which an appeal lies to the Supreme Court, declines to allow said appeal or to take any action whatever in the premises.

Thereupon, upon motion of Mr. Turner, it is ordered that the issuance of mandate herein to the court below be, and the same is hereby stayed for the period of thirty (30) days in addition to the stay of fifteen (15) days allowed by rule 32 of this court.

* * * * * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a Corporation, and American Bonding Company of Baltimore, a Corporation, Appellants,
vs.
KENNEDY J. HANLEY, Appellee. } No. —.

The above named appellants, Empire State-Idaho Mining and Developing Company, a corporation, and American Bonding Company of Baltimore, a corporation, respectfully shows that the above entitled cause is now pending in the circuit court of appeals for the ninth circuit, and that a judgment has therein been rendered on the 6th day of February, A. D. 1905, affirming the decree of the circuit court of the United States for the district of Idaho, northern division, made and entered on the 10th day of May, 1904, and that the matter in controversy in said suit exceeds ten thousand dollars ($10,000.00) besides costs, and that this cause is one in which the United States circuit court of appeals for the ninth circuit has final jurisdiction, except that an appeal lies to the Supreme Court of the United States and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal:

Wherefore, the said appellants pray that an appeal be allowed them in the above entitled cause directing the clerk of the United States circuit court of appeals for the ninth circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed, and that if error be found, corrected according to the laws and customs of the United States.

Dated, Feb'y 23d, 1905.

GEORGE TURNER,
W. B. HEYBURN,
F. T. POST,
Attorneys and Solicitors for Appellants.

(Endorsed:) Petition.

Mar. 10th, 1905.—I am doubtful of the jurisdiction, but give appellants the benefit of the doubt. The question can be settled on a motion to dismiss. Appeal allowed. Bond $380,000. D. J. Brewer, associate justice. Filed March 23, 1905. F. D. Mockton, clerk.

Know all men by these presents, that we, Empire State-Idaho Mining and Developing Company, a corporation, and American Bonding Company of Baltimore, a corporation, as principals, and National Surety Company, as surety, are held and firmly bound unto Kennedy J. Hanley in the full and just sum of three hundred and eighty thousand dollars, to be paid to the said Kennedy J. Hanley, and his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of March, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a regular term of the United States circuit court of appeals for the ninth circuit, to-wit, on February 6th, A. D. 1905, in a suit depending in said court between Empire State Idaho Mining and Developing Company, a corporation, and American Bonding Company, of Baltimore, a corporation, appellants, and Kennedy J. Hanley, appellee, a judgment and decree was rendered against the said Empire State-Idaho Mining and Developing Company, a corporation, and American Bonding Company, a corporation, appellants, and the said Empire State-Idaho Mining and Developing Company, a corporation, and American Bonding Company *Company* of Baltimore, a corporation, as appellants, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the judgment and decree in the aforesaid suit and a citation directed to the said Kennedy J. Hanley, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said Empire State-Idaho Mining and Developing Company, a corporation, and American Bonding Company of Baltimore, a corporation, shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, [SEAL.]
By EDWIN PACKARD, Pres't.
Attest: F. J. KILNER, Secretary.
AMERICAN BONDING COMPANY OF BALTIMORE,
By GEORGE L. RADCLIFFE,
Assist. to President.
Attest: EDWIN W. POE, Sec'y.
NATIONAL SURETY COMPANY, [SEAL.]
By JOEL RATHBONE,
Resident Vice President.
Attest: RICHARD J. MORIARTY,
Resident Ass't Sec'y.

Sealed and delivered in presence of

GEORGE TURNER.
GEO. WELWOOD MURRAY.

Approved by—

DAVID J. BREWER,
Associate Justice of the Supreme
Court of the United States.

Mar. 18, 1905.

Form No. 175. 500–1-12–'05.

Extracts from Charter of the American Bonding Company of Baltimore.

"That the directors shall be elected annually by the stockholders on the second Monday in January in each year, and they shall elect from their number at the first meeting of the board, a president, one or more vice-presidents, an executive committee, to be composed of five or more members of the board, of which the president and vice-president shall be members *ex-officio*; said directors shall also have power to elect a secretary and a treasurer (which offices may be held by one person), and shall also have power to elect one or more assistant secretaries and assistant treasurers (which offices may be held by one person), and to appoint and employ such other officers, clerks and agents, as the business of said company shall from time to time require."

Extract from the Minutes of the Proceedings of the Board of Directors of the American Bonding Company of Baltimore at the Meeting Held June 1st, 1896.

"Resolved, That the president or vice-president is hereby authorized, empowered and directed to make and appoint such agents and to execute such powers of attorney to accept process for and on behalf of this company, or to authorize the attorneys and agents to execute bonds for and on behalf of this company, as shall be needful, to the same extent and effect as though said appointments were severally made by separate action of the board of directors in each instance, and the secretary or assistant secretary is hereby empowered and directed to authenticate such appointments, affixing the corporation seal of the company to same."

* * * * * * *

Extract from the Minutes of the Proceedings of the Board of Directors of the American Bonding Company of Baltimore at the Meeting Held on January 10th, 1905.

Resolved, by the board of directors of the American Bonding Company of Baltimore, on this 10th day of January, 1905, that two per-

sons be elected officers of the company, to be known each as assistant to president.

"It is further resolved, that both persons, or either of said persons, appointed or elected to be assistant to president, shall on and from the date of said appointment or election, be authorized and empowered, on behalf of said American Bonding Company of Baltimore, to sign, execute, certify or endorse all bonds, undertakings, deeds, certificates checks, drafts, debentures, contracts or other instruments or writings, except certificates of the stock of the said American Bonding Company of Baltimore to the same effect and with the same binding obligation as though said bonds, undertakings, deeds, certificates, checks, drafts, debentures, contracts or other instruments or writings, had been signed, executed, certified or endorsed by the president or a vice-president of the said American Bonding Company of Baltimore.

Election of officers for the ensuing year then being in order, was proceeded with in due form, the following gentlemen being unanimously elected, by ballot:

President	George Cator.
First vice-president	Charles A. Webb.
Second vice-president	Ernest Hoen, Jr.
Secretary	Edwin W. Poe.
Treasurer	Wm. E. P. Duvall.
Assistant to president	Heber H. Stryker.
Assistant to president	George L. Radcliffe.
Assistant secretary	Charles R. Laurenson.
Assistant treasurer	F. Buchanan Owen.

I hereby certify that the above are true extracts from the charter of the company and from the minutes of the meetings of the board of directors of the American Bonding Company of Baltimore, held June 1, 1896, and January 10th, 1905, respectively.

In testimony whereof, I hereunto set my hand and affix the seal of the company this 17th day of March, 1905.

[SEAL.] EDWIN W. POE, Secretary.

Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.

STATE OF NEW YORK, } ss:
County of New York, }

On this 17th day of March one thousand nine hundred and five, before me personally came Joel Rathbone, known to me to be the resident vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing bond of Empire State-Idaho Mining and Developing Company and American Bonding Company of Baltimore, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in

the city of New York, State of New York; that he is the resident vice president of said company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the act of Congress of August 13, 1894; that the seal affixed to the within bond of Empire State-Idaho Mining & Developing Company and American Bonding Company of Baltimore, is the corporate seal of said company and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as resident vice president of said company, and that he is acquainted with Richard J. Moriarty and knows him to be the resident assistant secretary of said company; and that the signature of said Richard J. Moriarty subscribed to said bond is the genuine handwriting of said Richard J. Moriarty, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of one million ($1,000,000.00) dollars.

Louis A. Dent is our agent to acknowledge service in the judicial district wherein this bond is given.

(Deponent's signature:)

[SEAL.] JOEL RATHBONE.

Sworn to, acknowledged before me, and subscribed in my presence this 17th day of March, 1905.

(Officer's signature, description, and seal:)

[SEAL.] A. L. ADAMS,
Notary Public, Kings Co.

Certificate filed in New York Co.

(Endorsed:) Supersedeas bond on appeal. Filed March 23, 1905. F. D. Monckton, clerk.

* * * * * * *

In the Supreme Court of the United States.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY and The American Bonding Company of Baltimore, Appellants,
vs.
KENNEDY J. HANLEY, Appellee.

To the clerk of the Supreme Court of the United States:

As counsel for appellee, I respectfully request that you cause to be printed before May 1st, 1905, the following portions of the record certified to you by the clerk of the circuit court of appeals for the ninth circuit, said record being found in seven printed volumes:—

1. Original complaint, vol. I pp. 1–21,
2. Answer, vol. I pp. 24–44,
3. Replication, vol. I p. 44,
4. Original decree of Judge Beatty dismissing the complaint (entered Dec. 30, 1899) vol. I p. 49,
5. Opinion of Beatty accompanying decree (Dec. 30, 1899) vol. II pp. 426–438,
6. Opinion of court of appeals May 6, 1901, (109 Fed. 712) vol. II pp. 453–477,
7. Decree of court of appeals May 6, 1901, vol. II p. 478,
8. Mandamus opinion court of appeals, Hanley *v.* Beatty, May 12, 1902, (117 Fed. 59) vol. III pp. 607–622,
9. Decree of Beatty December 17, 1902, vol. V pp. 1012–1014,
10. Opinion court of appeals Nov. 9, 1903, (126 Fed. 97) vol. V pp. 1213,
11. Decree of court of appeals Nov. 9, 1903, vol. V pp. 1228–1230,
12. Modified decree of Beatty May 10, 1904, vol. VII p. 182,
13. Opinion court of appeals Feb. 6, 1905, vol. VII p. —
14. Decree court of appeals Feb. 6, 1905, vol. VII p. —
15. Order of court of appeals denying appeal to supreme court, Feb. 10, 1905, vol. VII, p. —
16. Appeal papers (that is, petition for appeal order allowing appeal, etc.) from court of appeals to Supreme Court of United States on appeal March 10, 1905, vol. VII p. —

M. A. FOLSOM.

[Endorsed:] File No. 19,704. Supreme Court U. S. October term, 1904. Term No. 604. Empire State-Idaho Mining & Developing Co., *et al.*, app'ts, *vs.* Kennedy J. Hanley. Request of counsel for appellee that certain portions of record be printed. Filed April 10th, 1905.

Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, and THE AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS,

vs.

KENNEDY J. HANLEY,
APPELLEE.

No.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANTS ON MOTION TO DISMISS THE APPEAL.

Under the act creating the Circuit Court of Appeals its decisions are made final in all cases where the jurisdiction of the Circuit Court is dependent *entirely on diverse citizenship*. Appeals may be taken in *all* other cases, of right.

Act of March 3, 1891 (26 Stats. L. 826).
Supplement R. S., p. 901, Section 6.

The jurisdiction of the Circuit Court must at all times be shown on the face of the complaint, and it has been held in such cases, construing the Court of Appeals statute, that if, in addition to the allegation of diverse citizenship, a distinct Federal question appears on the face of the complaint, the right of appeal exists from the Circuit Court of Appeals to the Supreme Court.

Spreckels Sugar Ref. Co. v. McLain, 192 U. S. 397.
Northern Pac. Rwy. Co. v. Soderberg, 188 U. S. 526.
Sugar Refining Co. v. New Orleans, 181 U. S. 281.
Howard v. U. S., 184 U. S. 681.
Col. Central M. Co. v. Turck, 150 U. S. 141.

There was some obscurity on this last point until the recent case of Spreckels Sugar Refining Company v. McLain, *supra,* but all question was removed by that case; and although the decision was by a divided court, it now stands as the law of the court.

The Federal question which will give the Circuit Court jurisdiction in the first instance must be one "arising under the Constitution or laws of the United States."

Sec. 2, Act of August 13, 1888 (25 Stats. p. 303).
Supplement Revised Statutes, p. 612.

It only remains to show that a case is made on the face of the complaint under the Constitution or laws of the United States.

The allegations of the complaint (pp. 1 to 7 of the record) show that complainant having been lawfully vested with title to eight twenty-fourths interest in the Skookum mine by a purchase at administrator's sale, completed by the payment of the purchase price and the receipt of a deed, all ratified and confirmed by the order of the Probate Court, the judge of that court, at a later period and without notice to complainant, made an order setting aside the sale made to complainant, on the ground that the same had been fraudulently obtained, and requiring the administrator to make another deed to the same interest to the Chemung Mining Company, the grantor of the defendants. The allegations further show that the administrator objected to making any further deed on the ground that he had exhausted his power when he made the deed to complainant, and that the defendants caused mandamus proceedings to be commenced in the District Court of Idaho to compel the administrator to make another deed, in which suit they prevailed; and that on an appeal of said mandamus suit to the Supreme Court of Idaho, the latter court affirmed the judgment of the District Court. The complaint alleges that complainant was not only not notified of the proceedings adverse to him in the Probate Court, but he was not served and was not a party in the mandamus suit, either in the District Court or in the Supreme Court. The complaint alleges that the defendants base their right to the property on these proceedings, but that the same were "begun secretly in order

to exclude him from any part therein and prosecuted to that end, without lawful notice to him or any attempt to make him a party in any way whatever. Further, that "*all* of the pretended proceedings of said case were and are absolutely null and void, and the decree of said case is null and the proceedings thereunder void."

The complaint further shows that defendants are in possession of the property mining out its ore, founding their right on the proceedings before set up, giving out and proclaiming that through them they have acquired title to the said interest, and that the action of the Probate Court and of the other courts constitutes an adjudication in their favor.

It would be difficult, we submit, to make a more complete case of the deprivation of property without due process of law.

It is now well settled that the Fourteenth Amendment applies to the action of the courts as well as to the action of the legislative and executive authorities of the states.

We will not cite the innumerable cases in this Court on due process of law, but will confine ourselves to a few of the late cases which show beyond question that the action of the courts of Idaho, as alleged in the complaint, constituted a deprivation of property without due process of law, within the meaning of the Fourteenth Amendment.

In *Noble v. Union River Logging Railroad,* 147 U. S. 175, it was held that when a railroad land grant had once been approved by the Secretary of the Interior,

the title had become vested, and that the order of approval could not be subsequently revoked, because to do so would be to deprive the railroad company of its property without due process of law, and the Secretary was enjoined from proceeding to carry out his order of revocation. The cause of revocation was fraud in procuring the original order of approval, as the cause of revocation stated in the order of the Probate Court in this case was fraud in procuring the sale and the making of the deed to complainant, but this Court held that title had become vested and could not be set aside.

The additional ground is in this case, which was not in the Noble case, that the order of revocation was made without notice to the complainant.

In *Scott v. McNeill,* 154 U. S. 34, the property of a living man had been administered on by the Probate Courts of the State of Washington, in the belief that he was dead. His property had been sold under orders of the Probate Court, deeds made, and the sales regularly confirmed, but, of course, without notice to him. This Court held that the sales were void because made without due process of law, and further, that the decision of the Supreme Court of Washington, with the owner properly before it, holding the sales good, was in itself depriving him of his property without due process of law. The Court said, among other things: "These prohibitions (Fourteenth Amendment) extend to all acts of the state, whether through its legislative, its executive or its judicial authorities." And again, "No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

In *Chicago, Burlington, etc., R. R. v. Chicago,* 166 U. S. 226, the Court went a step further and said: "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, violates that constitutional inhibition; and as he acts in the name of the state, and is clothed with the state power, his act is that of the state." (pp. 233, 234.)

See as further illustrating the principle:

Pennoyer v. Neff, 95 U. S. 714.
Lennard v. Louisiana, 92 U. S. 480.
Hagar v. Reclamation Dist. No. 108, 111 U. S. 708.
U. S. v. Lee, 106 U. S. 220.

Would the jurisdiction of the Circuit Court have been maintained on the allegations of the complaint if there had been no averment of diverse citizenship? Undoubtedly it would, because under the doctrine of the late cases from which we have quoted, the complaint shows a deprivation of property without due process of law; and that, in the language of the statute fixing the jurisdiction of the United States Circuit Courts, makes a case "arising under the Constitution or laws of the United States."

It is quite usual for pleaders in framing bills to refer to laws or constitutional provisions which they claim have been violated, and that feature is absent in this bill, and it may be said, therefore, that it was not the intention of the pleader in this case to invoke the jurisdiction of the Court on constitutional grounds, but there are two answers to such a contention. First: The intention of the pleader is immaterial. If he sets up facts showing a Federal question, that is all that the law requires. Second: While it is not unusual for pleaders to refer to statutes or Constitution, it is not strictly good pleading to do so. The books lay it down that a pleader should confine himself to the facts and leave it to the courts to apply the law. So that no inference can be drawn from the failure of the pleader in this case to invoke, in express terms, the protection of the Federal Constitution. Undoubtedly he could have held the case in court, by virtue of the Federal question stated on the face of the complaint, had the jurisdiction of the Court upon other grounds been defective; and that is the test.

There is a line of cases relating to appeals from the Circuit Court direct to the Supreme Court, under Section 5 of the act of 1891, in which it is held that it must appear on the record that the Federal question was distinctly raised and passed on in the lower court, and in which there must have been affirmative mention of the Constitution, statute or treaty to constitute the raising of such question. We conceive that those cases have no application to appeals from the Circuit Court of Ap-

peals to the Supreme Court. The right of appeal from the Circuit Court of Appeals is given in all cases other than those where the jurisdiction of the Circuit Court depended *entirely* on diverse citizenship, and in determining whether there was another ground of jurisdiction in the Circuit Court than diverse citizenship one must look, not at a bare claim or mention of some statute or constitution, such as would be sufficient to show that a Federal question was raised in the court below under Section 5, and as would show that the action of the Court was actually invoked on that question, but must look at the logical effect of the allegations of the complaint. If those allegations are such as to show jurisdiction in the court below on another ground than diverse citizenship, then the appeal must be allowed, even though the constitution, law or treaty involved be not mentioned.

Chief Justice Waite laid down the rule for ascertaining the sufficiency of the jurisdictional averment in

Gold Washing & Water Co. v. Keyes, 96 U. S. 199.

In that case the petition for removal, which had the same relation to the jurisdiction of the Circuit Court in removal cases that the complaint has in cases of original jurisdiction, set out three statutes of the United States fully, on which petitioner relied, but it did not connect them with the case by apt and proper averments.

Chief Justice Waite said: "The office of pleadings "is to state facts, not conclusions of law. It is the duty "of the Court to declare the conclusions and of the par-"ties to state the premises."

"In pleading the statutes, therefore, the facts must "be stated which call it into operation. The averment "that it is in operation will not be enough, for that is "the precise question the Court is called on to deter- "mine." Again, the jurisdiction must be shown "by a "statement of facts in legal and logical form such as "is required in good pleading."

1 Chitty, Pl., 213.

That no more is necessary in jurisdictional averments is shown by two very recent cases:

Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526, and
Warner v. Searle & Herath Co., 191 U. S. 195.

In neither of these cases was the statute specifically set up or any claim or right under it made, but in both this Court ruled that there was a distinct ground of jurisdiction stated other than that of diverse citizenship. In the latter of the two cases it appeared that it was intended to rely on the allegation of diverse citizenship and to make a case only of common law infringement of a trademark, but since the allegations, although informal and imperfect, were sufficient to show infringement of a registered trademark under the act of Congress, the Court held that the case was one in which the jurisdiction of the Circuit Court did not depend entirely on diverse citizenship.

The distinction we have in mind is made plain when the language of Sections 5 and 6 of the act of 1891 are examined and contrasted.

Section 5 gives a right of appeal from the Circuit Court to the Supreme Court in three classes of cases:

a. In a case which "involves the construction or ap-"plication of the Constitution of the United States."

b. "In which the constitutionality of any law of "the United States, or the validity or construction of any "treaty made under its authority is drawn in question."

c. "In which the Constitution or law of a state is "claimed to be in contravention of the Constitution of "the United States."

In the first of the three classes of cases the constitutional question must have been "involved." In the second it must have been "drawn in question." In the third it must have been "claimed." All three expressions mean the same thing, namely, that the question must have been distinctly presented for decision in the court below. In the language of the last of the three classes, it must have been "claimed."

The claim may be made in the complaint, the answer, the replication, during the introduction of testimony, by a request to charge the jury, or in innumerable other ways, but it is requisite that in some of these ways the claim should have been made distinctly and explicitly, so as to have been brought to the attention of the lower court and ruled on; otherwise, a case is not made in which the constitutional right is "claimed." Again, if facts are stated in a complaint which show that the law of a state is in contravention of the Constitution of the United States, but if the question is not stated in such a manner as to show that it was relied on as the gravamen of plaintiff's case, and if the case in fact goes off on other questions, the constitutional question not being presented and decided, then equally, we have a case in

which the constitutional question was not "claimed" within the meaning of Section 5 of the statute. But under Section 6 of the act, which gives appeals from the Circuit Court of Appeals to the Supreme Court, there is no room for such a criterion. Under that section the decisions of the Circuit Court of Appeals are made final in all cases where the jurisdiction of the Circuit Court depended *entirely* on diverse citizenship, and right of appeal is given in all other cases. Whether the jurisdiction of the Circuit Court depended entirely on diverse citizenship is a question dependent on the allegation of the complaint construed according to the ordinary rules of pleading. In pleading, the pleader does not "claim" anything except in his demand or prayer for relief. He simply sets out the facts of his case in due and logical form, and asks the relief to which he conceives himself entitled. If on the facts stated he is entitled to the application of the Constitution of the United States for his protection, the Court applies it, and that is all there is to it. In such a case his rights are founded upon the Constitution, and the case is one in which the jurisdiction is founded, in part at least, on the presence of a constitutional question. In such a case, moreover, it is not essential that the Court should have considered or passed on the constitutional question. If it necessarily arises from the allegation, that ground of jurisdiction is present, and no lapse of Court or counsel can remove it from the case.

This distinction, we conceive, answers the cases cited by appellee in his brief on the motion to dismiss. Two

only of those cases came from the Circuit Court of Appeals, and one of them only by appeal under Section 6. These cases we will notice last.

The cases appealed from the Circuit Court direct, under Section 5, quoted by appellant, all presented the simple question whether the right or immunity arising under the Constitution or laws of the United States, which it was insisted was in the case, had been claimed below, or if claimed, whether it was a real and substantial claim, and the holding in each case was against such contention.

Grace v. American Central Ins. Co., 109 U. S. 278.
Appeal from Circuit Court under Sec. 5.

In this case there was no contention that a Federal question was presented. The jurisdiction was planted wholly on diverse citizenship, and the decision of this Court was that such diversity was not shown.

Lampases v. Bell, 180 U. S. 276.

Appeal from Circuit Court under Sec. 5.

In this case it was insisted that the Federal question was shown on the face of the complaint, but nevertheless the question was, whether it was presented in such a way and was in fact such a question as would authorize an appeal under Section 5. The city of Lampases had attempted to set up on behalf of part of the territory comprising it that it had been illegally embraced

within the city limits, and that to hold persons within such territory liable for the debts of the city would be to deprive them of their property without due process of law, etc. It was held that the city had no interest in such a controversy, and could not litigate it, and hence that the case did not present a real and substantial claim within the meaning of Section 5.

No such holding can be made in the present case, because, if Hanley's complaint disclosed a deprivation of property without due process of law, as we have shown it did, then his interest in contesting it cannot be controverted.

York v. Texas, 137 U. S. 15.

Error to Supreme Court of Texas.

The pertinency of this case to any proposition here is not apparent. There was no question of the jurisdiction of a Circuit Court of the United States, and the gravamen of the case is, that a statute of Texas converting a special appearance to question the sufficiency of process into a general appearance upon which judgment might be rendered, was not in contravention of the Fourteenth Amendment.

The case is probably cited because of the remarks of Mr. Justice Brewer that if the law were unconstitutional the appellant had not yet been hurt. But the complainant in this case is doing what Mr. Justice Brewer said appellant might do in that case if his property was seized or threatened under an invalid judgment—he is asking the remedial and preventive pro-

cess of the Court to prevent the consummation of the unconstitutional act. The Probate Court of Idaho, as the result of its unconstitutional action, undertook to avoid complainant's deed, gave defendants a deed, put them in possession of the property, and according to the allegations of the complaint, they were holding it under the second deed, and proceeding to despoil it. In any event the action of the Idaho courts clouded the title of complainant, and thereby rendered it less valuable, and was a taking of property within the meaning of the Constitution.

In opposition to the inference sought to be drawn from this case we cite *Noble v. Union River Logging Railroad,* 147 U. S. 175, where the Court employed its preventive process against the head of a department of the Government to defeat unconstitutional action which would have had no other effect than to cloud complainant's title.

Cosmopolitan Company v. Walsh, 193 U. S. 460.

Error to the United States Circuit Court.

Here again was no question of the jurisdiction of the Court on the complaint, but simply whether there was a real and substantial controversy in the case over the effect or application of the Constitution.

The case illustrates the inutility of alleging constitutional provisions. The replication in the case alleged "That the plaintiff has been and is being deprived of his property, *viz.*, the property sought to be recovered

in this action, without notice, hearing, opportunity to be heard, or due process of law, and in violation of the Constitution of the United States," but because the Court could see that the controversy in fact was over the construction of the laws of Colorado, it was held that no real or substantial question of constitutional immunity was presented or claimed in the case. The difference between that case and the one now before the Court is that the complaint here sets out in due and logical form, as the gravamen of the case, a state of facts which shows a deprivation of property without due process of law. True, it does not mention the Fourteenth Amendment, but since a mention of the Constitution is insufficient without a statement of facts which shows its real application, it necessarily follows that a statement of facts which shows its real application, without mention of the Constitution, must be sufficient. Nowhere on the face of the complaint in this case is there a suggestion that the action of the Idaho courts is defensible or can be defended on some construction of the local law. The fact that the Court below attempted to so defend it cannot add to or take from the averments of the complaint which show jurisdiction. It might, however, be pertinent if the question here were whether the constitutional right was involved in the case or claimed, within the meaning of Section 5 of the act of 1891.

Cornell v. Green, 163 U. S. 75.

Appeal from the Circuit Court under Sec. 5.

This case well illustrates the distinction between appeals under Section 5 and Section 6 of the act of 1891

which we have attempted to draw. The appeal was under Section 5, and the Court states the principle which governed it in almost the first sentence, "No construc-"tion or application of the Constitution can be said to "have been involved in the judgment below when no "construction or application thereof was either expressed "or asked for." The fact that an immunity under the Constitution was claimed first appeared in the assignment of errors. The Court, being at liberty to scan the entire record, could see that the only question litigated below was one of statutory construction, and could properly give effect to Section 5, which limited appeals to cases where a question of constitutional right is involved or claimed.

Ansbro v. United States, 159 U. S. 695.

Appeal from the Circuit Court under Sec. 5.

This case merely holds that no question of constitutional right is involved or claimed in a case when the question is first raised in the assignment of errors, and manifestly it has no application to the question now before the Court.

Ex Parte Lennon, 150 U. S. 393.

Appeal from the Circuit Court under Sec. 5.

In this case it was held that the petition for the writ of *habeas corpus* did not present to the Court any constitutional question, and that none was passed on. This is simply another adjudication that in appeals under Section 5 the Court will scan the entire record to de-

termine whether a constitutional question was involved, raised or claimed in the court below, and that in default of such a question an appeal will not lie.

The petition in this case undoubtedly alleged in a very general way facts which showed lack of due process. But following the distinction which we have attempted to draw, it seems clear to us that although facts may be set up on the face of a complaint which show ground for the application of the Constitution, this Court would disregard them where the case is brought to it under Section 5, if, on looking through the entire record, as it may do on such appeals, it could see that the case was fought out in the Court below on another and a different theory, because in order to maintain the jurisdiction on appeal in such cases, it is necessary that the constitutional question was "involved," "drawn in question" or "claimed" in the Court below. But it seems equally clear that in such a case depending here on appeal under Section 6, the appeal ought to be sustained, because in such a case the inquiry is whether the jurisdiction of the Circuit Court was based in whole or in part on a real and substantial controversy which called for the construction or application of the Constitution. After alleging the proceedings in the Probate Court, the complaint in the case at bar then proceeds: "And your "orator alleges that the proceedings of said Probate "Court, of date August 13, 1897, were without jurisdic- "tion of either the subject matter or the parties in inter- "est; that after the close of the July term of said Court "it had no power or authority by law to set aside, at the "succeeding term of August, 1897, the judgment and de- "cree made at its former term, as was assumed to be done

"August 13, 1897, except by regular proceedings for "that purpose, to which the parties thereto were entitled "to notice, if it possessed any power in that behalf; and "all of the pretended proceedings of said date were ab- "solutely null and void, and the decree of said date is "null and the proceedings thereunder totally void."

Now why are these proceedings, at a subsequent term, without notice, alleged to be null and void? They might be null and void because of statutory provisions, but the bill does not so allege. But they were certainly null and void because they contravened the provisions of the Fourteenth Amendment to the Constitution of the United States. This any court could see, and, therefore, why should the allegation be referred to local law rather than to the Constitution of the United States?

If the complaint had alleged that the proceedings were null and void because in contravention of the Constitution, we apprehend that no one would question the Federal jurisdiction. But what reason is there for such an allegation? Cannot the Court draw a necessary inference as well as the pleader? Indeed, as stated by Mr. Justice Waite in *Gold Washing & Water Co. v. Keys, supra,* the Court is the one and the only one to draw the inference, and it would have been bad pleading for the pleader to attempt to do so.

Carey v. Houston Ry. Co., 150 U. S. 170.

Appeal from Circuit Court under Sec. 5.

The Federal question which was claimed to be in this case arose on the face of the complaint, but, for the reasons stated in commenting on the last case, it has no

application here. Moreover, it is impossible to make out by even the most liberal inference that the complaint set up facts showing a deprivation of property without due process of law. The complaint made a case of fraudulent and collusive judgment procured to be rendered by the representatives of the stockholders of the railway company for the purpose of defrauding the latter. That the stockholders were properly in court in the case in which judgment was rendered, through their representatives, was not questioned.

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239.

Appeal from Circuit Court of Appeals under Sec. 6.

This case we admit was governed by the same provisions of law which govern our case, and if the principles laid down in it contravene our right of appeal, then we are out of court. The principle of the case is that the Federal question set up on the face of the complaint must be real and substantial, and not merely colorable. The only averment in the complaint which at all indicated a Federal question was the averment that the complainant had a right to maintain its telegraph lines on the railway of respondent, independent of contract, under the statutes of the United States. This was held to not present a real and substantial controversy, because, as said by the Court, "In view of the settled construc-"tion of the statute (to the contrary) we could not per-"mit such a contention to be recognized as the basis of "jurisdiction." The words in parenthesis are ours.

Moreover, the averment was a mere conclusion of law, and one which, as stated by the Court, was untenable. Measured by anything stated or established in this case, the jurisdiction of this Court to entertain our appeal is impregnable. The right of complainant to the application of the constitutional protection guaranteed him, if the facts stated by him were true, was unquestionable, and the facts stated by him were pleaded in due and logical form so as to necessarily draw to him the protection of the Constitution.

New Orleans v. Benjamin, 153 U. S. 423.

Certified from the U. S. Circuit Court of Appeals.

The question here was whether a Federal question appeared on the face of the complaint. The act of Louisiana repealing the law creating the Police Board made no provision for the payment of the indebtedness created by that state instrumentality. This fact was set up in the bill and it was alleged that the repealing act was in violation of Section 10, Article 1, of the Constitution; but the bill alleged further that the city of New Orleans had succeeded to the liabilities of the Police Board, and the prayer of the bill was, among other things, that the Court compel the city to satisfy such liabilities. This Court held that the case did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, because the bill was framed on the theory that the city of New Orleans succeeded to the debts of the Police Board, was liable for them to the same extent, and had the

same power in every respect to provide for their payment. Moreover, that this theory was sound, and hence that the pretense that the repealing act impaired the obligation of contracts, was merely colorable, and presented no real and substantial controversy. There is nothing, we submit, in this case which militates against the right of appeal in our case.

Counsel for appellee has quoted extensively from this and the preceding cases in his brief. We will not follow him in that course, because it is the inference to be drawn from the reason of cases that is valuable and controlling, and the language of judges, however broad and comprehensive, is always to be read and limited by the questions actually before them.

Before leaving this branch of the case we again call the attention of the Court to

Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526, and
Warner v. Searle & Herath Co., 191 U. S. 195.

These cases came up from the Circuit Court of Appeals under Section 6 of the act of 1891. In each of them there was diverse citizenship, but it was held that there was in each of them, also, on the face of the complaint, a Federal question. But in neither of them were the provisions of the statute on which the Federal question hinged specifically referred to, and in the first of them, at least, it is apparent that the pleader had no intention of raising a Federal question in the complaint. The theory of the complaint in that case was that title

was indisputably in the Northern Pacific Railway Company, and the averment that the land in controversy was valuable only for the granite in it, which the defendant was proceeding to waste, was for the purpose of invoking the preventive power of the Court. The proposition that granite was a mineral and that the land for that reason did not pass to the railway company was the contention of the defendant. Yet since the complaint showed that the land was valuable only for its granite, this Court held that it presented the question whether granite was a mineral, and whether the land passed to the railway company. The rationale of the case is that the intention of the pleader is immaterial. If the complaint in fact shows a Federal question, that is sufficient, and the case may be appealed to this Court under Section 6.

We now pass to another question. The allegations of the complaint to which we have heretofore called attention relate to an eight twenty-fourths (8-24) interest in the Skookum mine, which complainant claimed to have acquired at administrator's sale. He also sued to recover another separate and distinct interest in the mine, to-wit, a one-eighth (1/8) interest, which he claimed to have owned, and which he alleged the defendants had acquired from him by fraud and deceit, and the rifling of an escrow depository. The courts below declined to give him any relief as to the eight twenty-

fourths (8-24) interest, but set aside in his favor the sale of the one-eighth (⅛) interest, and it is this latter action of which the defendants are now complaining. Since we prevailed as to the eight twenty-fourths (8-24) interest, concerning which the complaint presented the constitutional question, appellee insists that the recent case of *Anglo-American Provision Company v. Davis Provision Company et al.*, 191 U. S. 376, is an authority against our right of appeal.

But we again remind the Court of the difference between the language of Sections 5 and 6 of the act of 1891. The Anglo-American Provision Company case was appealed directly to the Supreme Court from the Circuit Court, under Section 5 of the act of 1891.

Under that section there is room to interpolate the proviso that one who has succeeded in the court below on the constitutional question presented may not use the presence of that question in the case as ground for appeal. Such has been the holding from the very beginning in appeals from the state courts, and it is easy to apply the principle to appeals from the Circuit Courts under Section 5.

But under Section 6 a right of appeal is given from the Circuit Court of Appeal in *all* cases other than the one specified class.

The right of appeal under Section 6 is made to depend on the rank or dignity of the case. If jurisdiction of the Circuit Court depended entirely on diverse citizenship the decision of this Court on appeal is final. If any other element of jurisdiction is present it is not final. How is it possible to write into that section any qualifica-

tion concerning the prevailing party or how jurisdictional questions may have been decided? The sole criterion of appeal under Section 6 is, was the jurisdiction of the Circuit Court dependent entirely on diverse citizenship? If not, the statute says the case may be appealed. The language of the act is:

"There *shall be of right* an appeal * * * where "the matter in controversy shall exceed one thousand "dollars besides costs."

That the limitation on appeals applied by this Court to Section 5 cannot be applied to appeals under Section 6 is made apparent by another consideration. Jurisdictional averments frequently have no relation to the merits of the case. A suitor comes into a Federal court or is brought into a Federal court by reason of his status as an officer of the Government, or, if a corporation, by reason of having derived its corporate existence at the hands of the Federal Government. It has been held that a right of appeal in such cases lies in favor of either party from the Circuit Court of Appeals to the Supreme Court.

Howard v. U. S., 184 U. S. 138.
Union Pacific R. R. v. Harris, 155 U. S. 326.
Sonnenthal v. Christian Moerlin Brewing Co., 172 U. S. 401.
Northern Pacific Railroad v. Amato, 144 U. S. 458.

Now it is manifest that the right of the parties to appeal cannot be gauged by the decision of the lower court on the jurisdictional fact set up. Suppose the defendant, in a suit by such a suitor, denies the jurisdictional fact, as that the plaintiff was in fact a marshal

of the United States or a clerk, or, if a corporation, that the corporation was chartered by Congress, and that issue is found for the plaintiff, but the defendant prevails on the merits, is the right of the plaintiff to appeal cut off? It would not, we apprehend, be so held. In fact, the right to appeal to this Court from the Circuit Court of Appeals has been maintained in this class of cases without reference to the decision on the jurisdictional questions. The statute, we submit, cannot be given two different interpretations. If the decision of the lower court on the jurisdictional questions be immaterial in one case it must be immaterial in all cases.

But we do not admit that this appellant prevailed below on the branch of the case involving the constitutional question and lost on the other. The constitutional question pervaded the entire case and governed the jurisdiction as to each branch of it. The transactions set up in the complaint were so connected that if there had been no allegations of diverse citizenship, the constitutional question raised with reference to one of them would have held the other and given the Court power to adjudicate with reference to it.

It is familiar law in the practice of courts of equity that good ground of equity with reference to one part of a connected transaction gives the court power to adjudicate with reference to the entire case.

Pomeroy's Equity Jurisprudence (2d Ed.), Vol. I, Sections 181 and 231 to 242.

There is no reason why this principle should not apply as well to the constitutional and statutory jurisdiction of the Federal courts as to their equitable jurisdiction. It has been so applied on the Circuit.

Brooks v. Stolley, 3 McLean, 523, per McLean, J.

It has also been applied by this Court, in principle, in the series of cases where bills which were original in the equitable sense, and therefore required diversity of citizenship for purposes of Federal jurisdiction, have been treated as ancillary and supplemental for the purpose of avoiding objection to the Federal jurisdiction.

Blossom v. R. R. Co., 1 Wallace, 655.
Minnesota Co. v. St. Paul Co., 2 Wallace, 609.
Freeman v. Howe, 24 Howard, 460.
Johnson v. Christian, 125 U. S. 642.
Pacific Railroad of Mo. v. Missouri Pacific Railroad, 111 U. S. 505.
Keppendorf v. Hyde, 110 U. S. 276.

The whole case, then, may be said to have been governed by the constitutional question.

And this view is enforced by the fact that there would have been no equity in the complaint as to the one-eighth interest if the allegations of the complaint as to that interest had stood alone. The complaint alleged fraud and deceit in the procurement of the making of the deed to the eighth interest, but it also alleged that the deed had then been placed in escrow and afterwards abstracted from the escrow depository by defend-

ants without complying with the escrow agreement. The averment of fraud and deceit in the making of the deed was mere *brutum fulmen*, and nothing can be predicated on it. The ground was cut out from under it by the averment, found as a fact by the lower court, that the deed had never been delivered.

A deed or other instrument deposited as an escrow is nothing but a mere scroll, and the grantee in the deed acquires no title by gaining possession of it by theft or fraud.

Calhoun Co. v. American Emigrant Co., 139 U. S. 127.

And where possession is so obtained the grantee can convey nothing even to an innocent purchaser for value.

American and English Encyclopoedia of Law, Second Ed., Vol. II, page 350, note 3.

Upon the facts alleged as to said eighth interest, therefore, there was nothing requiring the interposition of a court of equity, and the complainant, being out of possession, had a plain, speedy and adequate remedy at law.

The complainant, then, has had the advantage from the beginning, of the case made by him in the complaint concerning the eight twenty-fourths interest. He stalled off with it a demurrer which would have put him out of court. He still has an advantage from it, because if our appeal be maintained, he can take a cross-appeal and still present that feature of the case to this Court, or if our appeal be dismissed he can then take an independent appeal. His right to appeal dates from

the same time as ours, namely, February 6, 1905, when the final judgment in the case was rendered.

Can the complainant be heard to say that the eight twenty-fourths interest is not in the case, for the purpose of dismissing our appeal, when it has been in the case to his advantage all along, and is still in the case for an entire year to permit to him an independent appeal? What is there to prevent him from appealing the case to the Supreme Court on the adjudication concerning that interest after this appeal is dismissed? And if he awaits until the last day of the year to take his appeal, where would we be with our cross-appeal if, having been once dismissed out of Court, we would still have a right of cross-appeal?

We submit to the Court that it does not lie in the mouth of the appellee to say that the eight twenty-fourths interest is not still in the case. Moreover, that these considerations show the inapplicability to an appeal, under Section 6, of the principle laid down to govern appeals under Section 5, by the case of *Anglo-American Provision Co. v. Davis Provision Co, supra.* The case should rather be governed by *Loeb v. Columbia Township Trustees,* 179 U. S. 478, where it was pertinently asked, "Can the case, so far as the township is "concerned, be considered as belonging to the class "which the act of Congress brings directly within the "cognizance of this Court, and yet not be regarded as "a case of that class with respect to the plaintiff?"

But over and above everything else, we deny that the constitutional question was adjudicated against complainant and in favor of appellant.

The decision of the Circuit Court of Appeals was, not that complainant had had due process of law in the Idaho courts, but that he had been guilty of such fraud in acquiring the eight twenty-fourths (8-24) interest, anterior to the action of the Idaho courts, that the Federal courts could not, in accordance with the rules of equity, give him any relief. Undoubtedly the complainant can prosecute an appeal to the Supreme Court if he cares to do so, on account of the failure to give him the relief sought with reference to the eight twenty-fourths (8-24) interest, although on the constitutional question raised by the complaint, the decision may be said to have been as much with him as against him. If complainant, prevailing on one branch of the case and losing the other (the constitutional question being avoided), can prosecute an appeal, it is difficult to see why the appellant, being in identically the same situation, cannot do the same thing.

The appeal here is the joint appeal of the Empire State-Idaho Mining and Developing Company and the American Bonding Company of Baltimore, the judgment below having been a joint judgment against both companies. How the Bonding Company was brought into the case is disclosed by the record, in case 1083, pp. 173-175, and the special appearance of that company to object to any judgment against it, and the nature of those objections, is shown at pp. 178 and 179 of the same record. The pages here referred to are the pages

of the record in the Circuit Court of Appeals, the record on appeal to this Court at the time of preparing this brief not yet having been prepared, much less printed. The Bonding Company had the right to litigate the question of its liability and the sufficiency of the process to bring it into court, and having been defeated in that litigation, had the right to appeal to this Court, because the jurisdiction of the Circuit Court as to it did not depend entirely, or at all, on diverse citizenship. The right to proceed against it arose from the fact that it had performed an act with reference to a case depending in the Federal Court, which, under the statutes of the United States and the law and practice of the Court, made it liable at the suit of the complainant. That act was the giving of a supersedeas bond in the equitable action brought by the complainant. The Federal statute assimilating procedure in the Federal courts to state procedure, has no application to an equitable action, and hence there is no known method of taking a summary judgment on such a bond, as is done on appeal bonds in legal actions under the influence of state statutes. If it is desired to proceed on such a bond there are only two recognized methods of doing so. One is by formal action on the bond and the other is by *scire facias* in the court where the bond was given. The proceeding by *scire facias* is not auxiliary or supplemental to the case in which the bond was given, but is an original action, only it must be brought in the court to which the record belongs.

Daniels, Chy. Practice (5th Ed.), Vol. II, page 1758.

Winder v. Campbell, 14 Howard, 443.

The course pursued here against the Bonding Company, if sufficient at all, must have had all the requisites of *scire facias,* which was an original action in the Federal Court, not dependent on the principal case, and having its jurisdiction founded on the Federal nature of the transaction. The case is here at the instance of both of the joint obligors in the judgment, and the jurisdiction as to one of them was not based on diverse citizenship. The motion to dismiss, then, cannot prevail as to either party because, the judgment being joint, both must join in the appeal.

It is true, as stated in the brief of appellee, that this case has been here before on petition for the writ of certiorari, and we ask the Court to recur to that petition and the brief supporting it, and to the record accompanying it, for an insight into the questions presented. It will be found by so doing that those questions are many of them novel and difficult, and such as ought to be settled by the court of last resort, and that great wrong and injury has been inflicted by their erroneous decision in the Court below. And in view of that fact, we pray the Court, if it shall be of the opinion that it is without jurisdiction to maintain this case here on appeal, to retain it as by certiorari, in accordance with the precedent set in the case of *Security Trust Co. v. Dent,* reported in the 187th U. S. Reports, at page 237.

The following, among other questions, are in the case:

First—Through an unfortunate misconstruction of the effect of certain testimony by the Circuit Court of Appeals, and against the clear preponderance of the testimony, the deed from Hanley to Clark and Sweeny for the one-eighth interest in the Skookum mine was set aside on the ground of fraud, although the trial Court, with the parties and witnesses before it, and familiar with the local atmosphere of the case, had found that there was no fraud and dismissed the complaint.

Second—The bill of complaint, although it set up nothing with reference to the eighth interest except the alleged fraud in procuring the deed, and prayed for nothing in legal effect except cancellation and restoration, was held to be a bill to quit title both to the eighth interest in the mine and to all ore bodies within its vertical limits, and the decision in the case on the merits was held to conclude defendants on both questions and to prevent them from showing on the accounting that the ore mined from the Skookum mine did not in fact belong to it, but belonged to another mine, the exclusive property of defendants, because the vein apexed in the latter mine.

Third—This decision was made in a mandamus suit brought against the Circuit Judge, to which suit the defendants were not parties, and when the case again reached the Circuit Court of Appeals the decision in the mandamus case was held to be the law of the principal case, and to prevent any further consideration of the nature of the suit.

Fourth—Although defendants were the undisputed owners of seven-eighths of the Skookum mine, they

were held to be wilful trespassers in mining ore from it, and were held to the rule of damages laid down by this Court in the Woodenware cases, to-wit, that of wilful trespassers, and were held liable on the accounting for the gross value of the ore mined by them, without deduction for mining, hoisting, milling and other expenses of turning the ore into money.

Thus they were, by a fiction, not only made to pay complainant for their own ore, but by the same fiction were made to pay him more than twice what it was worth, and this without having been heard on the questions which were held to have established the fiction against them. As a result of this course of decision the defendants find themselves with a money judgment against them of more than three hundred thousand dollars (principal and interest), and with one hundred and fifty thousand dollars more sequestered under an order of the Court, and held to await the final judgment in this case.

If the Court shall deem us unduly persistent in again urging our prayer for certiorari, the former petition having been denied, we submit that the results reached in the case are so grievous and so inequitable as to justify us in pressing upon the Court, within the limit of its rules and to the full extent of its patience, the justice and propriety of securing, in some way, a review in this Court of the rulings of the Court below.

Respectfully submitted.

F. T. POST.
W. B. HEYBURN.
GEORGE TURNER.
Solicitors for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, AND AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS,

vs.

KENNEDY J. HANLEY,
APPELLEE.

No. 604.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

On Motion of Appellee to Dismiss the Appeal, Accompanied by Printed "Extracts from Transcript of Record."

Come now the appellants in the above entitled cause, and suggest that the printed "extracts from the transcript of record" are not sufficient to fully inform the Court of the issue, and to warrant the submission and consideration, at this time, of the motion to dismiss the appeal herein.

Statement.

The appellee has filed a substantial, but not full, transcript of the record in the Circuit Court of Appeals for the Ninth Circuit, complete perhaps, with the exception of citation and service, before the return day upon which appellants should file the record, of which he has printed certain extracts, to wit:

The bill of complaint, answer, replication, decree, opinion of Circuit Judges, decrees and opinions of Circuit Court and Court of Appeals; order of Circuit Court of Appeals denying appeal to Supreme Court, petition for appeal, and allowance by Supreme Court Justice; bond on appeal; and thereupon moves to dismiss the appeal because no federal question appears.

This he may do, provided so much of the record has been printed as may be necessary to make the motion intelligible; but if the Court is required to look into the unprinted record it will postpone the motion until the hearing on the merits.

Deficiency of Printed Extracts.

The printed extracts are deficient in at least two material particulars:

1. The Appellee contends (p. 8, brief) that "the claims of complainants with respect to the two interests were based upon distinct and independent grounds."

(Citing 109 Fed. Rep., p. 713.)

The Appellants' contention is that all the transactions set up in the complaint were so connected in fact that the questions raised with reference to one would have held the other (pp. 25, 26, 27, Appellants' brief) and authorized adjudication of the whole controversy.

True, the decision in 100 Fed. Rep., cited by appellee

and just above quoted is that the transactions were entirely distinct, two separate instead of one more or less joint, but that is the issue upon the appeal and depends not upon the allegation, but the proof, upon the whole record bearing thereupon, not printed, but to which the Court must refer in order to "act understandingly."

Only so much of the proofs has been printed as is recited in the opinions of the Courts.

2. How the American Bonding Company, of Baltimore, a corporation, was brought into the case, how it tried to get out, or rather to insist that it had not legally been brought into the case and the jurisdiction of the Court, so that a judgment against it would not be a deprivation of property without due process of law is shown in the printed extracts *only* as recited in the opinion of the Court of Appeals. This question is discussed at pages 129-31 appellant's brief herein, and it is apparent that the Court must look into the unprinted transcript to find the facts upon which to base its decision.

THE RULE GOVERNING PRINTING OF RECORDS ON MOTION TO DISMISS

will be found in the following decisions of this Court:

Ex parte Russell, 13 Wall. 671 (Dec. Term, 1871).
Thomas & Co. *v.* Wooldridge, 23 Wall. 288 (October Term, 1874).
Clark *v.* Hancock, 94 U. S. 493 (October Term, 1876).
(In these cases the record had been printed.)

National Bank *v.* Insurance Company, 100 U. S. 43 (October Term, 1879).

In this case the Court, Mr. Chief Justice Waite delivering the opinion, said:

"The further consideration of this motion is postponed until the case is heard on its merits. The record has not

been printed, and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

Crane Iron Company *v.* Hoagland, 108 U. S. 5 (October Term, 1882).

Mr. Chief Justice Waite delivered the opinion of the Court and said:

"The motions to dismiss are made because, as is claimed, no Federal question is involved. The records have not been printed, and on these motions we can look only to the statements of counsel as they appear in the briefs. The assignment of errors has been printed in the brief for the defendants, and the second and fifth assignments clearly present questions of which we have jurisdiction. Whether the errors thus assigned appear in the records we cannot on these motions, as they are now presented, finally determine, but in the absence of any showing to the contrary, we will presume they do. The motion to dismiss must, therefore, be overruled."

Waterville *v.* Van Dyke, 115 U. S. 290 (October Term, 1885).

In this case, Mr. Chief Justice Waite, delivering the opinion of the Court, said:

"The record has not been printed, and in *National Bank* v. *Insurauce Co.*, 100 U. S. 43, we announced the rule that to get a decision on a motion to dismiss before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file. * * *

There is nothing on which we can act unless we go to the transcript.

The further consideration of the motion is consequently postponed until the case is for hearing on its merits."

Texas Land and Cattle Company *v.* Scott, 137 U. S. 436 (October Term, 1890).

Per curiam. Syllabus.

"Motion papers should contain in themselves so much of the record as to enable the Court to act understandingly but when they are deficient in that respect the Court may, if it please, examine the record."

In Carey *v.* Houston & Texas Central Railway, 150 U. S. 179 (October Term, 1893).

Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

"On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the Court to act understandingly without reference to the transcript.

Walston *v.* Nevin, 128 U. S. 578 (October Term)."

And in that case, the original and amended bills, the answers and replications, the opinion of the Circuit judge, the final decree, the two appeals and proceedings therein, and the assignment of errors in both courts, were held sufficient for the purpose of the motion; but inspection of that case will show that the issue clearly appears on the face of the printed abstracts, and no specific deficiency of record was pointed out, as was held to be necessary in *Walston* v. *Nevin*, quoted.

While it has been held (Walston *v.* Nevin, *supra*) that the Court would only require the printing of so much of the record as would enable it to act understandingly without referring to the transcript, accompanied by the intima-

tion that opposing counsel should specifically point out the deficiency, yet, a Federal question being raised, "*a motion to dismiss would not be sustained.*"

In the case at bar, it is submitted that the Court cannot "act understandingly without referring to the transcript," on both propositions referred to.

It appearing that the Court must "refer to the transcript" in order to ascertain whether the appellant's or appellee's brief correctly states or understands the issues, there being a disagreement, we are remitted to the rule as laid down in Mayer *et al. v.* Walsh, 108 U. S. 17 (October Term, 1882), that—

"In the absence of a printed record the Court will not grant a motion to dismiss when the motion papers disclose equitable reasons why it should not be granted; and the further consideration is postponed until the hearing on the merits."

Whether the action of the Court in taking summary judgment against the American Bonding Company of Baltimore, one of the appellants, but not otherwise nor theretofore a party to the record, under the circumstances disclosed in the transcript, but not fully shown in the printed extract (except in the recitals of the opinions of the lower courts), might be sustained or reversed in this Court cannot be determined or considered on the motion to dismiss, particularly upon the printed extract, unless as an equitable reason appearing on the face of the motion papers why the motion *must* be postponed to the hearing on the merits. The appeal will not be dismissed (on motion) merely because the claim by which the Federal question is presented is not well founded.

If the claim or question is presented in the transcript the motion must be denied or postponed.

See Taylor's Juris. and Pro. Sup. Ct., p. 626.

Citing—

Blythe *v.* Hinckley, 180 U. S. 333.

Should appellee be aggrieved by the necessary delay incident to a hearing upon the merits, he could print all the record, or move to advance the case.

Where the question of jurisdiction cannot be determined without looking into the merits, the motion to dismiss for want of jurisdiction will be denied, with permission to argue it upon the hearing. *On motion merely to dismiss the merits of the case cannot be considered.*

Taylor's Juris. and Pro. Sup. Ct., p. 637.

Citing—

Hecker *v.* Fowler, 1 Black, 95.
Semple *v.* Hagar, 4 Wall. 431.
Lynch *v.* De Bernall, 131 U. S. 94.
Bohanan *v.* Nebraska, 118 U. S. 231.
Hill *v.* Chicago and E. R. Co., 129 U. S. 170.

The quotation from the opinion of the lower court (109 Fed. p. 713), at p. 8 appellee's brief, peculiarly lacks force when considered in connection with the volume of the transcript now printed, because the correctness of the conclusions and the necessity of referring to the transcript for a determination by this Court of their correctness is one of the material issues involved in the suggestion of a deficiency in the printed extract.

MERITS.

One word as to the merits, in consequence of appellee's reply brief filed on the moment of submission. Nothing can be clearer than that appellants only want a full and free discussion and decision upon the merits and the law

applicable to the whole case. Manifestly either is impossible at this date in the present term.

Appellee asks the court not to allow an oral argument of the motion to dismiss (p. 2, reply brief), which request may be termed unnecessary, in view of the contrary practice, to say the least; tells of the expense of filing the record in advance of the appellants' filing; adverts to the fraud upon himself found by the lower court (p. 3, reply brief), while discreetly silent as to the frauds he committed and which the Court of Appeals held were sufficient "to deprive him of the assistance of a court of equity" (pp. 10–11, appellee's original brief).

While appellants chafe under the decision against them, and seek to have it corrected, appellee endeavors to make the legal point, in lieu of moral credit, that upon the first hint of his own frauds he "abandoned his fight, and has never made any claim to it since." (Pp. 18–19, appellee's original brief.)

It would seem as if appellee were estopped from characterizing appellant's acts as "the grossest conceivable fraud" (at p. 3, reply brief), for the purpose of hastening the decision upon the motion and forestalling a hearing upon the merits.

The Court is told (at p. 7, appellee's reply brief), that a *certiorari* should not be granted. Just why this statement should be made at this time is not clear. If possessing argumentative force, upon the hearing of the motion, seemingly it would furnish an additional reason for looking kindly upon, anyhow looking into, the appeal, because appellant's "last chance."

Appellee (at p. 2, of his reply brief) goes rather outside the record to present himself as a poor man, and in the same sentence to ask special providences on that account, forgetful of Sec. 712, R. S., but, whatever be his condition, and he has pretty actively upheld his end of the litigation

all the while, since opportunity knocked at his door, it might be answered that he will take a very short cut to riches if able to stave off a decision upon the merits herein.

Appellants have nearly $400,000 in cash tied up and impounded, besides expense of supersedeas bonds, while appellee is amply protected against loss, with interest and damages added.

In the matter of hardship, only that lacks weight upon a motion, the burden bears more heavily upon appellant than appellee.

It is further said (at p. 3, appellee's reply brief) that the complaint states two causes of action, meaning that the suit is not an entirety but separable. That is a material issue in the case, but cannot be ascertained without looking into the unprinted transcript and passing upon the merits.

Appellants contend that the escrow agreement was one transaction, appellees that it was another, and it is one or two causes of action accordingly as one or other set of witnesses is believed (referred to at pp. 33 and 53–4, printed extract).

These points are referred to herein because advanced in appellee's reply brief in support of his appeal for an immediate decision of the motion and to choke off full argument ——— by his adversaries.

Conclusion.

1. The Court may, of course, if disposed, take the time and trouble to search through the unprinted transcript for the issues involved and not fully appearing in the printed extracts. In one case (Texas Land & Cattle Co. *v.* Scott, *supra*), the Court has held that it could examine the record; but it is not known that the Court ever has exercised this power or looked beyond the motion papers. No reason has been shown for making this case an excep-

tion. That is a matter wholly within the Court's discretion, and not subject to argument.

2. That the Court will find time for anything like a sufficiently thorough scrutiny of the whole record (seven printed volumes, as stated at p. 3, appellee's original motion and brief) is doubtful.

3. That any argument of the unprinted case, or the merits, can be attempted at this time is impossible even if allowable, although appellee has gone far outside his "printed extracts," as see—

P. 22 of his original brief.

Pp. 2 and 7, reply brief.

It is respectfully submitted that the only open question upon this motion is whether the Court will consider the motion papers strictly, or look into the unprinted record at the term end, in a case where the movant is amply protected against damage (which even he does not question) and that may be brought on to a hearing upon the whole record, including the merits and motion, at the first day upon which the Court will be in session for arguments with appellee's consent and the Court's permission. Only the appellants can be harmed by a too hasty decision; delay cannot advantage them a penny.

Respectfully submitted.

F. T. POST,
W. B. HEYBURN,
GEORGE TURNER,
Solicitors for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, and THE AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS,

vs.

KENNEDY J. HANLEY,
APPELLEE.

No.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION OF APPELLEE TO DISMISS THE APPEAL, AND BRIEF IN SUPPORT THEREOF.

MOTION TO DISMISS.

Comes now Kennedy J. Hanley, Appellee herein, and moves this Honorable Court to dismiss the appeal herein because the jurisdiction of the United States

Circuit Court for the District of Idaho in this case depended entirely upon diversity of citizenship, and the decree of the United States Circuit Court of Appeals for the Ninth Circuit, from which this appeal was taken, is, therefore, final within the meaning of Section 6 of the Act of March 3, 1891.

And the motion is made upon the further ground that if a federal question did appear upon the face of the complaint, appellants do not bear such a relation to the question as would entitle them to appeal to this Court because of that fact.

M. A. Folsom
Attorney for Appellee.

To the Appellants, and to their counsel, George Turner and F. T. Post:

You are hereby notified that the Appellee, Kennedy J. Hanley, will on May 1st, 1905, on the meeting of the United States Supreme Court on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion, and the brief in support thereof hereto attached.

M. A. Folsom
Counsel for Appellee.

Service admitted March 30, 1905.

George Turner
Counsel for Appellants.

Copy

THE RECORD.

The record in this case in the Court of Appeals comprised seven printed volumes. This appeal having been taken in due form from a decree of the Circuit Court of Appeals for the Ninth Circuit, the right to review it depends upon the allegations of the complaint. (Colorado Cent. Co. v. Turck, 150 U. S. 138.)

Therefore, for the purposes of this motion we would be required to print only the complaint. But in addition to that other parts of the record which may be of service in understanding the case will be printed.

BRIEF OF APPELLEE.

FACTS.

On March 19, 1899, appellee, Kennedy J. Hanley, brought this suit in equity in the United States Circuit Court for the District of Idaho, against Charles Sweeny, F. Lewis Clark, and the Empire State-Idaho Mining & Developing Company. The suit involved Hanley's claim to the ownership of an undivided one-eighth interest, and of an undivided one-third interest in the Skookum mining claim, situated in Shoshone County, Idaho.

The claim of Hanley in respect to the two interests rested upon distinct and independent grounds. The one-third interest was owned by David McKelvey during his lifetime. After the latter's death certain proceedings were had in the Probate Court which, it was claimed, amounted to a sale of that interest by the administrator of the estate to Hanley, but the administrator had subsequently conveyed this interest to the

Chemung Mining Company by deed, and the latter company had conveyed the same to the Empire State-Idaho Mining & Developing Company. Hanley, by this suit, asked a decree declaring his title to the one-third interest to be good against the claim of the said Empire State Company.

Hanley's title to the one-eighth interest was derived through mesne conveyances from the original grantee under a patent from the United States. This interest had been conveyed by Hanley to Sweeny and Clark by deed dated April 30, 1898, and deposited on that date in the Exchange National Bank of Spokane, Washington, to be delivered to Sweeny and Clark upon certain stipulated conditions. Hanley claimed that Sweeny and Clark had obtained possession of this deed wrongfully and contrary to the terms of the escrow agreement, and had afterward made a pretended deed of this interest to the Empire State Company. Hanley prayed that his deed of April 30, 1898, be declared null and void, and that his title to this interest be declared good and valid. The complainant also prayed for a receiver of the property, and that defendants be compelled to account for Hanley's share of the proceeds of the mine taken after the making of the escrow deed.

Issue was joined and testimony taken before an examiner and reported to the Court. After argument the Circuit Court held that Hanley never became the owner of the one-third interest because there was no return under oath by the administrator to the Probate Court of the sale to Hanley, as required by the statute of Idaho (which had been construed by the Supreme Court of that state), and therefore no title had passed. As

to the one-eighth interest, the Circuit Court held that Hanley had not proved his case to the satisfaction of the Court. A decree was therefore entered against Hanley as to both interests.

Hanley appealed to the Circuit Court of Appeals for the Ninth Circuit, and on May 6, 1901, that Court held that Hanley was not entitled to relief as to the one-third interest, because of his conduct in the Probate Court. As to the one-eighth interest, the Court of Appeals held that Hanley had been induced through gross fraud of Clark and Sweeny to execute and deposit in escrow the deed, and that the same had never been delivered, but that Clark and Sweeny had gotten possession of the same without paying the consideration therefor, and in fraud of Hanley's rights, and the said deed was therefore held to be void. (See 109 Fed. 712; 126 Fed. 97.) The Court of Appeals reversed the decree as to the one-eighth interest and ordered further proceedings. In November, 1901, a petition by the defendants for a rehearing was denied, and thereupon they filed a petition for certiorari in this Court, which petition was denied on January 13, 1902. (183 U. S. 700.)

Upon the filing of the mandate an order was made referring the case to a master to take an accounting as to the one-eighth interest. Subsequently, in March, 1902, the District Judge suspended this order and refused to allow the master to proceed. Upon an application for a writ of mandamus, the Court of Appeals, on May 12, 1902, held that Hanley was entitled to have the master proceed with the accounting. (117 Fed. 59.) The master thereafter reported that Hanley was

entitled to recover from the Empire State Company $265,241.83, with interest. The Circuit Court, upon the coming in of the master's report, reduced the amount to $175,867.02, because the master had failed to allow the defendants the cost of working the property while they fraudulently excluded Hanley from entering the mine or sharing in the proceeds. The Court entered a decree (November, 1902) quieting Hanley's title to the one-eighth interest, and gave him judgment against the Empire State Company for the last named amount.

The defendants appealed from this decree and Hanley filed a cross-appeal. The defendants filed a supersedeas bond with the American Bonding Company, of Baltimore, as surety. The Court of Appeals awarded the defendants nothing by their appeal, but held on the cross-appeal (November 9, 1903) (126 Fed. 97) that the Circuit Court erred in allowing the defendants their working costs while they fraudulently excluded Hanley from the mine and appropriated his share of the proceeds to themselves. The Court of Appeals remanded the case with directions to ascertain the date when the fraudulent exclusion ceased, and to modify the judgment accordingly. The defendant company filed a petition for rehearing, which was denied, and thereafter filed another petition for certiorari in this Court. That petition was denied on March 7, 1904. (193 U. S. 671.)

The Circuit Court, after taking evidence as to the date when the fraudulent exclusion ceased, fixed the date and modified the decree as directed by the Court of Appeals, and entered a decree against the American

Bonding Company for the amount for which that company was liable as surety on the supersedeas bond. Another appeal was taken by the two companies to the Court of Appeals, and on February 6, 1905, that Court affirmed the decree as modified. (See Record.) An appeal was prayed to this Court from the last decision, was considered by the Court of Appeals, but was denied on the ground that the case was not one which could be carried to the Supreme Court by appeal.

Thereafter one of the Justices of this Court allowed an appeal.

We respectfully move the Court to dismiss the appeal upon the ground that the decree of the Court of Appeals is final, and no review of the same can now be had in this Court by appeal.

OUR CONTENTIONS.

We contend that this appeal should be dismissed because:

1. The jurisdiction of the Circuit Court depended entirely upon diversity of citizenship.
2. No federal question was passed upon by either the Circuit Court or the Court of Appeals. Both Courts assumed that the jurisdiction depended entirely upon diversity of citizenship.
3. The appellants and appellee have heretofore always maintained that the jurisdiction rested entirely upon diversity of citizenship.
4. The claim to the one-third interest, concerning which the appellants now assert that a constitutional question was raised by Hanley, was abandoned by him in May, 1901, and that interest is no longer involved in this litigation.

5. If sufficient allegations of a constitutional question with reference to the one-third interest were made in the complaint, appellants do not bear such a relation to the question as would entitle them to appeal to this Court.
6. This appeal was taken merely for delay.

I.

JURISDICTION OF THE CIRCUIT COURT DEPENDED ENTIRELY UPON DIVERSITY OF CITIZENSHIP.

The complaint clearly showed that the Circuit Court had jurisdiction in this case by reason of diversity of citizenship, plaintiff being a citizen and resident of Idaho, two of the defendants being citizens and residents of Washington, and the corporation defendant being organized under the laws of the State of New York.

"If the jurisdiction of the Circuit Court was depend-
"ent entirely upon diversity of citizenship the decree of
"the Circuit Court of Appeals is final, and this appeal
"cannot be maintained."

Stevenson v. Fain, 195 U. S. 165.

Appellants claim that jurisdiction also depended upon the fact that a constitutional question was involved. Is this true?

The complaint contained two causes of action, one relating to a one-third interest in the Skookum mine and one relating to a one-eighth interest therein.

"*The claims of the complainant with respect to the*
"*two interests were based upon distinct and independent*
"*grounds.*" (109 Fed. p. 713.)

The claim as to the eighth interest was that Hanley, as owner thereof, had been fraudulently induced by his co-tenants, Clark and Sweeny, to execute and deposit in escrow a deed to them of that interest in the Skookum mine; that they had concealed from him the fact that a large body of ore had been uncovered by them in the property in a tunnel which they had run through other property, and had represented to him that the property was valueless. It was further claimed that after inducing him to place this deed in escrow they fraudulently got possession of the same without delivery and without paying any consideration therefor, and conveyed it to the Empire State Company. These contentions of Hanley as to this interest were sustained by the Circuit Court of Appeals for the Ninth Circuit, and it is this one-eighth interest (with the fruits thereof) which is now the sole subject of litigation.

Hanley's claim as to the one-third interest was based upon the contention that he had purchased it from the administrator of the estate of David McKelvey, and that the Probate Court of Shoshone County, Idaho, had confirmed the sale to him; that a corporation in which Clark and Sweeny and he were interested, called the Chemung Mining Company, also made a bid to the administrator for the interest, and that after the Probate Court had entered a decree confirming the sale to Hanley, and after a deed had been executed to him, that court, without notice to him and without taking any proof, made another order or decree setting aside the previous decree in Hanley's favor on account of misrepresentation and fraud, and confirmed a sale of said interest to the Chemung Mining Company and di-

rected the administrator to execute a conveyance thereof to said company. That thereafter the District Court of the State of Idaho, upon an *ex parte* showing, ordered the administrator of said estate to execute a deed in pursuance of the decree of the Probate Court, and upon appeal the judgment of the District Court awarding the mandamus was affirmed. That thereafter the Chemung Mining Company transferred the interest to the Empire State-Idaho Mining & Developing Company.

Hanley claimed that the proceedings of the Probate Court were without jurisdiction of either the subject matter or the parties; that the proceedings were taken after the close of the term of that court and without notice to him, and that the same were therefore null and void and not binding upon him, but that said proceedings and the deed executed in pursuance thereof cast a cloud upon his title, and he therefore asked that the defendants should be adjudged to have no right or title to this third interest.

At the hearing of this case the United States Circuit Court found that the sale by the administrator to Hanley was void because the administrator had not made a return of his sale under oath to the Probate Court, as required by the statute of Idaho. The Circuit Court of Appeals refused to inquire into Hanley's complaint as to the third interest because it found that at the time of the confirmation by the Probate Court of the sale to him he and others concealed from the representative of the Chemung Mining Company, who was also a bidder, the fact that he had raised his bid. It was held, therefore, by the Court of Appeals that his conduct was

such as to deprive him of the assistance of a court of equity to quiet his title to the one-third interest.

The appellants here claim that the allegations made by Hanley in his complaint as to the third interest (which was decided against him) amounted to a claim by him that he had been deprived of this interest by the Probate Court without due process of law, and that, therefore, his allegations were sufficient to support the jurisdiction of the Circuit Court upon the ground of the federal questions involved, independent of the diversity of citizenship of the parties.

Is this the proper construction of the complaint? We respectfully contend that it is not.

This Court has repeatedly held that the allegations of a federal question must appear in the complaint, and must be clear and distinct and must show a substantial federal question. All doubts are to be resolved against the jurisdiction of the Circuit Court.

Grace v. American Cent. Ins. Co., 109 U. S. 278.

Lampasas v. Bell, 180 U. S. 276.

"When a suit does not really and substantially involve "a dispute or controversy as to the effect or construction "of the Constitution or laws of the United States, upon "the determination of which the result depends, it is "not a suit arising under the Constitution or laws."

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239.

"The judicial power extends to all cases in law and "equity arising under the Constitution, but these are "cases actually and not potentially arising, and jurisdic-

"tion cannot be assumed on mere hypothesis. In this "class of cases it is necessary to the exercise of original "jurisdiction by the Circuit Court that the cause of ac- "tion should depend upon the construction and applica- "tion of the Constitution, and it is readily seen that "cases in that predicament must be rare."

New Orleans v. Benjamin, 153 U. S. 423.

The allegations of the complaint in this case amount simply to a statement by Hanley that his title to the third interest was good because he had purchased it from the administrator under a Probate Court decree, and that the subsequent decree of the Probate Court, which annulled the decree in his favor and awarded the property to another, was void because the Court ceased to have jurisdiction to change its former decree after term time, without notice. This was a question of local law. It was an allegation merely of lack of jurisdiction, and not of lack of due process. It depended in the first instance on the law of the State of Idaho regulating probate courts.

In York v. Texas, 137 U. S. 15, this Court said:

"The proposition is that the denial of a right to be "heard before judgment simply as to the sufficiency of "the service operates to deprive the defendant of lib- "erty or property. But the mere entry of the judgment "for money, which is void for want of proper service, "touches neither. It is only when process is issued "thereon, or the judgment is sought to be enforced, that "liberty and property is in present danger. If at the "time of immediate attack protection is afforded, the "substantial guarantee of the Amendment is preserved, "and there is no just cause of complaint. . . . It "certainly is more convenient that a defendant be per-

"mitted to object to the service, and raise the question "of jurisdiction, in the first instance, in the court in "which suit is pending. But mere convenience is "not substance of right. If the defendant had taken "no notice of this suit, and judgment had been formally "entered upon such insufficient service, and under pro- "cess thereon his property, real or personal, had been "seized or threatened with seizure, he could by original "action have enjoined the process and protected the pos- "session of his property. If the judgment had been "pleaded as defensive to any action brought by him, "he would have been free to deny its validity. There "is nothing in the opinion of the Supreme Court or in "any of the statutes of the state, of which we have been "advised, gainsaying this right."

There was no pretense on Hanley's part that the District Court of the State of Idaho or the Supreme Court would hold the proceedings in the Probate Court, if attacked by him directly, to be of any effect as against his purchase. He alleged merely that the District Court and the Supreme Court held that as between the Chemung Company and the administrator it was the duty of the latter to obey the decree of the Probate Court, but there was no pretense that such obedience deprived Hanley of his rights or property. On the contrary, *he contended in this suit that the proceedings were void for lack of jurisdiction, and had no binding effect upon him. He did not mention the Constitution or laws of the United States* in his complaint. If Hanley had alleged that the Supreme Court of Idaho had held that the effect of the second decree of the Probate Court was to deprive him of his property, and to award it to the Chemung Company, it may be that such allegations would have amounted to a claim of lack of due pro-

cess of law. But no such allegations are found in the complaint. There is no pretense that he could not have secured redress by direct suit in the state courts of Idaho attacking the decree as being void for lack of jurisdiction.

Unless Hanley first established the regularity of the sale to him, he would not be in a position to attack the regularity of the sale to the Chemung Company. He could not claim to have been deprived of the interest until he should have established that he had acquired it. The constitutional question, if any was raised, was therefore conjectural.

Cosmopolitan Co. v. Walsh, 193 U. S. 460.

In Cornell v. Green, 163 U. S. 75, this Court said:

"The Constitution of the United States is not men-
"tioned in the bill of Cornell or in the demurrer of the
"defendant, or in the decree or opinion of the Court.
"The case appears to have been treated throughout as
"depending upon a question of chancery practice, not
"of constitutional right."

In Ansbro v. U. S., 159 U. S. 695, 697, this Court said:

"A case may be said to involve the construction or
"application of the Constitution of the United States
"when a title, right, privilege or immunity is claimed
"under that instrument; but a definite issue in respect
"of the possession of the right must be distinctly dedu-
"cible from the record before the judgment of the court
"below can be revised on the ground of error in the dis-
"posal of such a claim by its decision."

In *Ex Parte* Lennon, 150 U. S. 393, 400, this Court said:

"Nor can the attempt be successfully made to bring

"the case within the classes of action in which the con-
"struction or application of the Constitution is involved
"in the sense of the statute on the contention that the
"petitioner was deprived of his liberty without due pro-
"cess of law. The petition does not proceed on any
"such theory, but entirely on the ground of want of
"jurisdiction in the prior case over the subject matter
"and over the person of the petitioner, in respect of in-
"quiry into which the jurisdiction of the Circuit Court
"was sought. If, in the opinion of that Court, the re-
"straining order had been absolutely void, or the peti-
"tioner were not bound by it, he would have been dis-
"charged, not because he would otherwise be deprived
"of due process, but because of the invalidity of the
"proceedings for want of jurisdiction. The opinion
"of the Circuit Court was that jurisdiction in the prior
"suit and proceedings existed, and the discharge was
"refused, but an appeal from that judgment directly to
"this Court would not therefore lie on the ground that
"the application of the Constitution was involved as a
"consequence of an alleged erroneous determination of
"the questions actually put in issue by the petitioner."

In Carey v. Houston Ry. Co., 150 U. S. 170, this Court said:

"The bill before us refers to no provisions of the
"Constitution upon which complainants relied to invoke
"the action of the Court in vindication of their sup-
"posed rights, or which was presented to be construed
"or applied by the Court. No question upon such con-
"struction or application was raised between the parties
"upon the record, or determined by the decree of the
"Circuit Court.

"It is argued that the record shows that complainants
"had been deprived of their property without due pro-
"cess of law by means of the decree attacked, but be-
"cause the bill alleged irregularities, errors and juris-
"dictional defects in the foreclosure proceedings, and

"fraud in respect thereof, and in subsequent transac-
"tions, it might have enabled the railroad company
"upon a direct appeal to have avoided the decree of
"sale, or which, if sustained on this bill, might have jus-
"tified the Circuit Court in setting aside that decree, it
"does not follow that the construction or application of
"the Constitution of the United States was involved
"in the case in the sense of the statute. In passing upon
"the validity of that decree, the Circuit Court decided
"no question of the construction or application of the
"Constitution, and, as we have said, no such question
"was raised for its consideration. Our conclusion is
"that the motion to dismiss the appeal must be sus-
"tained."

See to same effect Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460.

II.

NO FEDERAL QUESTION WAS DECIDED BY EITHER THE CIRCUIT COURT OR COURT OF APPEALS. BOTH COURTS ASSUMED THAT THE JURISDICTION RESTED ENTIRELY UPON DIVERSE CITIZENSHIP.

While of course this Court would not be bound by the construction by the inferior courts of this complaint, yet it is important to notice that the Circuit Court never attempted to decide any constitutional question, if any such was involved. The opinion of the Circuit Court was that Hanley never had any title to the one-third interest because the statute of Idaho relating to probate sales had not been complied with when the pretended sale was made to him by the administrator.

The Court of Appeals likewise did not attempt to decide any such constitutional question. It held that

Hanley was not entitled to any assistance from a court of equity as to this one-third interest, because he had concealed certain facts from the representative of the Chemung Company at the time of the transaction in the Probate Court.

Moreover, the Circuit Court of Appeals was asked to allow an appeal to this Court from its decree, which application was denied on February 10, 1905. (See Record.) That Court ruled that this case was not one which could be taken to the Supreme Court. In other words, it held that jurisdiction of the Circuit Court depended entirely upon diversity of citizenship.

Will this Court review a case upon the theory that a constitutional question was raised in the complaint, when it was never a factor in the decisions of the trial court and could not be even considered by the Supreme Court in passing upon the merits of the case?

III.

BOTH APPELLEE AND APPELLANTS HAVE ALWAYS MAINTAINED THAT THE JURISDICTION OF THE CIRCUIT COURT DEPENDED ENTIRELY UPON DIVERSITY OF CITIZENSHIP.

The complainant in his bill did not refer to the Constitution of the United States and did not rely upon it. He claimed no immunity or privileges under it, nor did he ask the application or the protection of the Constitution of the United States or the construction of the same.

Cornell v. Green, 163 U. S. 75.

Carey v. Houston Ry. Co., 150 U. S. 170.
Ex Parte Lennon, 150 U. S. 393.

The appellants herein have heretofore made two applications to this Court in this case for a writ of certiorari. (183 U. S. 700; 193 U. S. 671.) In doing so they have expressly and impliedly represented to this Court that the jurisdiction of the Circuit Court depended entirely upon diversity of citizenship. In the first petition, page 50 (October term, 1901, Record No. 494), the petitioners stated:

"And your petitioners have no right of appeal or writ "of error in this case for the reason that jurisdiction of "the same was originally assumed by the United States "Court because of the diversity of the citizenship of the parties, plaintiff and defendant."

IV.

THE CLAIM TO THE ONE-THIRD INTEREST, CONCERNING WHICH THE APPELLANTS ASSERT THAT A CONSTITUTIONAL QUESTION WAS ALLEGED, WAS ABANDONED BY HANLEY IN MAY, 1901.

It should be kept in mind that the only interest which was awarded to Hanley by the lower courts was the one-eighth interest in the Skookum. Appellants here do not pretend that the allegations of the complaint with reference to that interest raised a constitutional question. They now pretend that the allegations as to the one-third interest only raise such a question. But that interest was awarded to appellants by the Circuit Court of Appeals in May, 1901, and thereafter Hanley

abandoned his fight as to that interest, and has never made any claim to it since. It then ceased to be a part of the case. The decree as to that interest was final at that time. The time has elapsed within which an appeal could be taken from the decree as to that interest.

Hill v. Chicago & Evanston R. Co., 140 U. S. 52.

Scriven v. North, 134 U. S. 366.

Even though the allegations as to the one-third interest were sufficient, independent of diversity of citizenship, to support the jurisdiction of the Circuit Court over that cause of action, they were not sufficient to support jurisdiction over the cause of action involving the one-eighth interest which would be the only subject of controversy in this Court if the appeal should be heard on the merits.

V.

IF SUFFICIENT ALLEGATIONS OF THE CONSTITUTIONAL QUESTION WITH REFERENCE TO THE ONE-THIRD INTEREST WERE MADE IN THE COMPLAINT, THE APPELLANTS HERE DO NOT BEAR SUCH A RELATION TO THE QUESTION AS TO ENTITLE THEM TO APPEAL TO THIS COURT.

"The decree did not injure defendant but sustained "its contention, and defendant is in no position to com- "plain that it is aggrieved by its own success."

New Orleans v. Emsheimer, 181 U. S. 153.

It will be observed that the only theory upon which the appellants claim that this appeal should be sustained

is that the allegations with reference to the third interest raised a constitutional question, and that while Hanley was denied any relief as to that interest, and has ceased to claim it, the Supreme Court has jurisdiction to determine questions raised by defendant as to the eighth interest which Hanley did recover, but concerning which no constitutional question was suggested. In other words, they seek to use as a lever a contention with reference to an interest which is no longer in controversy, to raise into this Court a controversy with reference to an interest concerning which no federal question was suggested. As to this latter interest, no pretense is made that a constitutional or other federal question is involved. The only questions involved as to this interest are questions of general law and of no public importance.

In Anglo-American P. Co. v. Davis P. Co., 191 U. S. 376, the appellants claimed that the jurisdiction of the Circuit Court was involved, and also that a constitutional question was raised by the allegations of the complaint. They, therefore, sought to sustain a direct appeal from the Circuit Court. After disposing of the first contention against the appellants, this Court said:

"With regard to the latter ground, the decision of "the Circuit Court again was in favor of the plaintiff, "and it has nothing of which to complain, 'As a general "rule a court will not allow a party to rely on anything "as a cause for reversing a judgment which was for his "advantage.' . . . This remark, to be sure, is not "strictly in point, as the plaintiff would not ask to have "the judgment reversed on the ground that this New "York law was constitutional, but it, with the quotation "from U. S. v. Jahn, helps to indicate a principle to be

"applied to the construction of the words 'in any case in "which the statute or law of a state is claimed to be in "contravention of the Constitution of the United States. "Those words are general in form, but they do not mean "that whenever a party makes a case of that sort he "may appeal directly to this Court whenever the de- "cision is against him, no matter on what grounds, al- "though his contention about the state law is sustained. "If a party comes into the Circuit Court alleging that "a state law is unconstitutional, and the Circuit Court "decides for him on that point, *the mere fact that there "was such a question in the case does not authorize him "to appeal to this Court on grounds that otherwise "would not support an appeal.* . . . The present "case illustrates the principle. The argument for the "appellant is devoted not to any constitutional or juris- "dictional point, but to an attempt to upset the decision "of the Circuit Court upon the question mainly of fact "as to the good faith, etc., of Weed in taking the as- "signment of the judgment. The provisions of Section "5 of the Act of 1891 were not intended to be made an "instrument for such attempts."

See *New Orleans v. Emsheimer,* 181 U. S. 153, to same effect.

In Lampasas v. Bell, 180 U. S. 270, this Court said:

"It follows, necessarily, that the plaintiff in error "has no legal interest in the constitutional question "which it raised, and upon which it claims the right to "come directly to this Court from the Circuit Court un- "der Section 5 of the Act of 1891, *supra.* To permit "it to come here directly from the Circuit Court would "make a precedent which would lead to the destruction "of the statute. We repeat, that questions which can "be raised under any of the subdivisions of Section 5 "of the Act must be real, the controversies they present "must be substantial, not only from the nature of the

"principles invoked, *but from the relation of the par-*
"ties to them by whom they are invoked."

The language of the cases from which the quotations are taken apply with equal force to Section 6 of the Act. The purpose of the legislation was to lessen the burden of this Court and to prevent delay.

VI.

THIS APPEAL WAS TAKEN MERELY FOR DELAY.

The record shows that this case was begun in the United States Circuit Court on March 19, 1899, to redress a fraud as to the one-eighth interest which was committed in April, 1898. Although Hanley has been vigorous in his assertion of his rights (126 Fed. 103), the defendants have, by frequent appeals, been able to retain the benefits resulting from their fraudulent conduct. This case has been in the United States Circuit Court of Appeals for the Ninth Circuit five times on appeal; three petitions for rehearing have been filed in that Court; one application for a writ of mandamus was heard; two applications to this Court for a writ of certiorari have been presented by appellants; and now they seek to longer delay this case by appeal to this Court upon representations directly opposite to those made by them in their application for certiorari.

The complaint clearly shows that the jurisdiction was originally invoked solely upon the ground of diverse citizenship. No constitutional question is pretended to be involved as to the property now in controversy, and the allegations which are claimed by appellants to

amount to a federal question were made by Hanley and related to an interest which it was decided he could not recover, and which he abandoned nearly four years ago. Appellants have twice represented to this Court in applications for certiorari that the jurisdiction depended upon diverse citizenship, and that they had no right of appeal. Will this Court delay this litigation to allow appellant to take a directly opposite position from that which has been heretofore taken?

We respectfully submit that this appeal should be promptly dismissed and an end be put to this exhausting litigation.

M. A. Folsom

Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY and the AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS

vs.

KENNEDY J. HANLEY,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF ON MOTION TO DISMISS.

THIS CASE SHOULD NOT BE CONTINUED FOR ORAL ARGUMENT.

We earnestly request the Court to pass on the motion to dismiss at this time, for the following reasons:

1. This case has been before the Circuit Court of

Appeals for the Ninth Circuit five times on appeal and once upon an application for a writ of mandamus. After each appeal, excepting the last one, it has been further delayed by petition for re-hearing. *Two applications for certiorari have already been made to this Court* by the present appellants, and in each case the petition has been denied. In one petition they expressly stated that the case was not an appealable one. This case has been pending in the United States Courts altogether over six years. *Of that time the case has been in the Circuit Court of Appeals and in this Court four years and six months.* This Court has well said in speaking of the careless exercise of the power to issue certiorari:

"So exercised, it might burden the docket of this "Court with cases which it was the intention of Con- "gress to terminate in the Court of Appeals, and which, "if brought here would simply prevent that *promptness "of decision which in all judicial actions is one of the "elements of justice.*"

Where the situation is presented of a poor man fighting a wealthy corporation in the Federal Court for more than six years, this Court will well understand that to unnecessarily continue a motion to dismiss in a case over which this Court has no jurisdiction, would be in effect a denial of one of the elements of justice.

2. Ordinarily, "oral argument is not allowed on mo- "tions to dismiss appeals or writs of error, and we per- "ceive no reason for making exception to the general "rule in the case before us." *Carey v. Houston*, 150 U. S. This Court is a much better judge of its own jurisdiction than counsel on either side can possibly be. Its

jurisdiction depends upon the constitution, statutes and its own decisions. The jurisdiction of this Court on appeals from the United States Court of Appeals depends upon the application of the law to the facts *stated in the complaint*, and the relation of the parties to the questions there stated. The complaint is not long, and whatever assistance this Court might receive from counsel has been rendered in the briefs submitted by the respective parties. If counsel have omitted any argument which might be of assistance to the Court, why have they done so?

3. The appellee herein, at great expense to himself, upon the allowance of the appeal, promptly caused the entire record to be filed, the case to be docketed, and so much of the record as is necessary to an understanding of the case to be printed. This was all done for the purpose of disposing of the motion to dismiss at the earliest possible date. We understand that this Court always encourages diligence, particularly in a case such as this, where it has required more than six years of the most vigorous effort to undo a fraud which has been characterized as the grossest conceivable. (109 Fed. 722.)

MERITS.

The pretense that the complaint states but one cause of action will not stand analysis. The right to the respective interests depended upon different facts. The only justification for uniting the causes of action for the one-eighth interest and the one-third interest was that each cause of action related to the same mining ground

and was between the same parties. Supposing that the parties to this controversy were all citizens of the same state and there were sufficient allegations of a federal question as to the one-third interest to support jurisdiction in the Circuit Court over the case, would the Circuit Court thereby acquire jurisdiction of the one-eighth interest? Clearly not. This Court has held that if two causes of action are united and one of which is of such a nature that the Circuit Court could not determine it if brought in a separate bill of complaint, such Court will not acquire the power to dispose of it if united with a case clearly within the jurisdiction of the Circuit Court.

Mississippi v. Cohn, 150 U. S. 202.

See also:

Fourth Nat. Bank v. Stout, 113 U. S. 684.
Henderson v. Wadsworth, 115 U. S. 264.
Ex parte Phoenix Ins. Co., 117 U. S. 367.

We repeat what we have said in our opening brief, that the parties have always construed this case to be one the jurisdiction of the Circuit Court over which depended entirely upon diverse citizenship. No constitutional question was stated as to the one-third interest. But even if such a question had been stated it was never passed upon and as to that interest appellants secured a decree in their favor. The question, therefore, is not a substantial question within the rule that a constitutional question must not only be substantial from the nature of the proceedings invoked, *"but from the relation of the parties to them by whom they are invoked."*

Lampasas v. Bell, 180 U. S. 270.

Banker's Mut. Co. v. Minneapolis Co., 192 U. S. 371. (Appeal from Court of Appeals.)

In their brief counsel for appellants have labored heavily to convince this Court and themselves that there is a distinction between the right to appeal to this Court directly from the Circuit Court and the right to appeal to this Court from a Court of Appeals. They admit that it has been expressly settled that to authorize an appeal from the Circuit Court the constitutional question must be a real and substantial one, and can only be urged as a ground of appeal by one against whom it has been decided. They argue that appeals from the Court of Appeals may be taken notwithstanding that the constitutional question is not substantial and notwithstanding it was not passed upon.

Section 5 of the Act of 1891 gives a right of direct appeal from the Circuit Court in a case which "involves a constitutional question." The section does not say expressly that the question must have been decided one way or the other. Yet this Court has said that only the party against whom the question was decided may appeal.

Anglo Co. v. Davis, 191 U. S. 376.

Section 6 provides that appeals may be taken from the Court of Appeals to this Court where jurisdiction depended upon some grounds other than diverse citizenship. The jurisdiction of the Circuit Court exists only where diverse citizenship exists, or when the case "arises under the Constitution, etc." This provision does not expressly state that the question must necessarily be de-

termined in rendering judgment, yet this Court has held that the provision means that a decision of the constitutional question must be necessary to a decision by the Circuit Court, or else it is not a real and substantial question sufficient to found jurisdiction upon. If it must be necessarily decided by the Circuit Court, must it not have been passed upon in order to be the basis of an appeal to this Court from the Court of Appeals upon the ground that such a question was involved?

The Court of Appeals was created to relieve this Court of its burdens. It was provided that certain cases could be forced upon this Court's attention. Those cases were *such as necessarily required* a determination of a federal question. It was not intended to compel this Court to pass upon cases wherein a federal question was accidentally mentioned, but which had not been decided in the lower courts and which could not be decided by this Court if the case should be reviewed.

Counsel have failed here to show that a constitutional question was raised in the complaint even by accident. The allegations of the complaint did not necessitate a decision by the lower courts of any federal question in disposing of the case. Diverse citizenship existed, and questions of fact and general law determined the case. Moreover the pretended federal question was not alleged as a part of the course of action now involved, but as to another which we have abandoned. No appeal lies from the decision as to that cause. Four years have elapsed since it was decided.

APPEAL AS TO BONDING COMPANY.

The Bonding Company voluntarily appeared and made itself a quasi-party to the litigation by signing a supersedeas bond. Judgment was rendered against that company upon a petition and notice in a method similar to that followed in

Woodworth v. Northwestern Ins. Co., 185 U. S. 354; 119 Fed. 148.
Gordon v. National Bank, 53 Fed. 471.
Meredith v. Santa Clara Co., 60 Cal. 617.

The right of the Bonding Company to an appeal depends upon the right of the Empire State Company to an appeal.

Gregory v. Van Ee, 160 U. S. 643.
Carey v. Houston, 161 U. S. 127.

CERTIORARI.

Counsel ask this Court, in the event this appeal is dismissed, to issue a writ of certiorari. They refer to the petitions heretofore filed and briefs in support thereof. It is not now in order for appellants to ask this Court to grant a writ of certiorari upon the same grounds which were urged in a petition which has heretofore been denied. The rule as to petitions for re-hearing applies here with equal force to petitions for certiorari.

Williams v. Conger, 131 U. S. 390.

Two petitions for certiorari have already been presented and denied. Exhaustive briefs were filed on each

application. Each was denied. Why should a third be granted?

Each point now presented has been heretofore elaborately discussed by all parties,

1. The question of fact was determined by the evidence of the defendants themselves. The Circuit Judges had no doubt about it. It is not true that the Circuit Court "had the parties and witnesses before it." The entire evidence was taken four hundred miles from the presence of the District Judge.

2. The complaint sought a cancellation of a deed for fraud and the quieting of title and an accounting. Defendants entered upon a full defense on the equity side of the Court, and did not raise a question as to the adequacy of the legal remedy.

3. The decision as to the nature of the suit was not made "in a suit to which defendants were not parties." It was made in this case upon mandamus applied for to secure a construction of a previous mandate of the Court of Appeals. The defendants appeared by counsel and argued the case. The answer foreclosed the question discussed.

4. Defendants were admittedly guilty of a gross fraud. They asked to be allowed to recoup from the value of ores mined, while the fraud was in progress, the amount expended in its perpetration. The court of equity cared nothing for their losses and denied relief. Is it strange?

All of the questions were presented more than a year ago to this Court.

This case has never presented any questions of law of any public interest. There has been no conflict of decision between the Court of Appeals in this case and any other appellate court. The case has turned largely upon questions of fact and upon a construction of the pleadings. The questions which appellants have sought to raise in the various proceedings had been previously waived by them or expressly foreclosed by their own pleadings. We respectfully submit that there is no excuse for a writ of certiorari, much less the necessity for the issuance of such a writ. The appeal should be dismissed, and the litigation thus terminated.

"There must be an end to litigation some time and we think this is a good time to terminate it."

Respectfully submitted.

M. A. FOLSOM,
Counsel for Appellee.

Supreme Court of the United States.

No. 604.—October Term, 1904.

The Empire State-Idaho Mining and Developing Company and The American Bonding Company of Baltimore, Appellants, vs. Kennedy J. Hanley. } Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 15, 1905.]

Hanley brought this bill in equity in the Circuit Court of the United States for the District of Idaho, setting up diversity of citizenship as the ground of jurisdiction, and asserted ownership of an undivided one-eighth interest, and of an undivided one third interest, in the Skookum mining claim, Shoshone County, Idaho. As to the one-third interest, Hanley claimed under certain proceedings in the Probate Court of that county, which were, without notice to him as he said, set aside, and the interest conveyed to the Chemung Company, and by the latter to the Empire State &c. Mining Company. Hanley's title to the one-eighth interest was derived through mesne conveyances from the original grantee under a patent from the United States. This interest Hanley had conveyed to Sweeny and Clark by a deed deposited in the Exchange National Bank of Spokane, to be delivered on certain specified conditions, and he averred that Sweeny and Clark obtained possession of the deed wrongfully and contrary to the escrow agreement, and afterwards made a pretended deed of the interest to the Empire State Company.

On hearing, the Circuit Court decreed against Hanley as to both interests. Hanley carried the case to the Circuit Court of Appeals, which held that he was not entitled to relief as to the one-third interest, but that he was as to the one-eighth interest. The decree was therefore reversed and the cause remanded for further proceedings. 109 Fed. Rep. 712. The case went back and was referred to a master for an accounting as to the eighth interest, who reported a large amount of money as due to Hanley. The Circuit Court reduced the amount by deducting the cost of working the property while Hanley was excluded from the mine, and entered a decree quieting Hanley's title to the one-eighth interest and giving him judgment against the Empire State Company for the last named amount. Defendant appealed from this decree and filed a supersedeas bond with the American Bonding Company of Baltimore as surety, and Hanley

prosecuted a cross appeal questioning the deduction. The Circuit Court of Appeals sustained the cross appeal and held that the Circuit Court erred in allowing defendants their working costs. 126 Fed. Rep. 97. The case was remanded with directions to modify the decree. This was done and recovery of the original amount decreed, and also recovery on the bond of the amount it was given to secure, and another appeal was taken by the companies to the Court of Appeals, which affirmed the decree. The pending appeal having been subsequently allowed, was submitted on motion to dismiss.

Mr. Chief Justice FULLER delivered the opinion of the Court:

We are of opinion that the jurisdiction of the Circuit Court was dependent entirely upon diversity of citizenship, and that this appeal must be dismissed. Appellants' contention is that the allegations of Hanley's complaint as to the one-third interest amounted to the assertion that he had been deprived of that interest by the Probate Court without due process of law, and were sufficient to support the jurisdiction of the Circuit Court on this ground, irrespective of diversity of citizenship. We do not so regard the allegations. What Hanley asserted was that his title to the third interest was good because he had purchased it from the administrator under the decree of the Probate Court, and that the subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice, and for lack of evidence.

Granting that the Fourteenth Amendment applies to the action of the courts as well as of the legislative and executive authorities of the States, the averments of the complaint did not suggest that the courts of Idaho would hold the later proceedings of the Probate Court, if attacked by Hanley directly, effectual to overthrow his purchase; or charge that in such action as had been taken they had committed error so gross as to amount in law to a denial by the State of due process of law. Hanley's contention was in effect that the later proceedings were void for lack of jurisdiction, and he did not pretend that he could not have obtained redress by direct suit in the State courts.

The Constitution and laws of the United States were not mentioned in the complaint, nor any dispute or controversy raised as to the effect or construction of the Constitution or laws on the determination of which the result depended; nor was any title, right, privilege, or immunity specially set up or claimed under Constitution or law.

If this had been a writ of error to a State court, the averments would not have brought it within section 709 of the Revised Statutes. If it had been a direct appeal from the Circuit Court under section 5 of the act of

March 3, 1891, it could not have been sustained because the construction or application of the Constitution of the United States was not distinctly presented for decision in the court below.

And as an appeal from the Circuit Court of Appeals under section 6 of the act of 1891, it cannot be sustained because it falls within the settled rule that: "Where the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as good pleading requires; and where the case is not brought within this rule the decree of the Circuit Court of Appeals is final." *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239.

If the allegation of diversity of citizenship had been omitted from the bill, the jurisdiction could not have been maintained.

The decisions of the courts below did not turn on any Federal question. The Circuit Court held that Hanley had no title to the one-third interest because the Idaho statute relating to probate sales had not been complied with; the Court of Appeals, that Hanley was not entitled to the aid of a court of equity, in respect of that interest, because of his conduct at the time of the transaction.

Appellants succeeded in their defence as to the one-third interest, and Hanley accepted the result on the second appeal. They now make a grievance of their own success and ask that the supposed constitutional question as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, it was in their favor. In our opinion this cannot be permitted. *Anglo-American Provision Company* v. *Davis Provision Company*, 191 U. S. 376; *Lampasas* v. *Bell*, 180 U. S. 270.

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.